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ACCOMPLICE.

See Murder, 2.

ACCOUNT STATED.

Pleading: account stated. The petition alleged that the defendants were indebted to the plaintiff for professional services and money advanced, and contained a bill of items. It further alleged that this bill was presented to the defendant, and, after the lapse of some months, returned by them without objection; *Held*, that the latter allegation was of a matter of evidence merely; that there was no allegation in the petition of the fact of an account stated or agreed upon between the parties; and that the cause of action, as stated, was a general *indebitatus assumpsit*. *Brown v. Kimmel*, 430.

ACTION.

See Administration, 1.

Constable, 1.

Principal and Surety, 5.

Railroad, 4.

ADJOURNMENT.

See Court Records, 1.

Grand Jury, 1.

Municipal Corporation, 1.

ADMINISTRATION.

1. AN ACTION TO SET ASIDE AN EXECUTOR'S FINAL SETTLEMENT cannot be maintained on the mere showing that an illegal allowance was made in favor of the executor; it must also appear that the allowance was procured by fraud. *Miller v. Major*, 247.

2. FINAL SETTLEMENT: APPEAL: EXHIBITION AND ALLOWANCE OF DEMANDS: REMEDY AGAINST DELINQUENT ADMINISTRATOR. A proceeding was brought in the probate court by an administrator *de bonis non*, charging that the former administrator had failed to account in his annual settlements for some of the assets of the estate, and praying for an amended settlement and an order of payment. The personal representative of the former administrator answered, denying the matters charged, and alleging that the estate of plaintiff's intestate was indebted to his intestate. Upon a trial the probate court so found, and gave judgment for the defendant accordingly. An appeal having been taken to the circuit court, this judgment was reversed, and plaintiff obtained judgment against the defendant for a balance found to be due. On appeal to this court, *Held*, 1st, That the judgment of the probate court was not based upon an annual settlement, but was such a final determination of the matters in controversy between the two estates as authorized an appeal; 2nd, That the proceedings should be treated as an exhibition of demands for allowance against the respective estates of which plaintiff and defendant were administrators, and the court was authorized to enter a money judgment against the defendant as administrator for the balance found due, and was not confined to making an order of delivery against him, or rendering a judgment against the sureties on the bond of the deceased administrator, as provided by secs. 47, 68, 69, Wag. Stat., pp. 77, 81, 82. *Seymour v. Seymour*, 303.

3. COMPENSATION OF ADMINISTRATOR PENDENTE LITE. An administrator appointed under section 13, page 72, Wag. Stat., pending a suit to test the validity of a will, is not, upon the termination of the suit and the surrender of the estate to his successor, entitled to charge a commission of five per cent. upon all the personal property of the estate. He should be allowed a commission only upon moneys actually paid out; and, in addition to this, a reasonable compensation for leasing real estate, for legal services and advice, and for collecting and preserving the estate. *Hawkins v. Cunningham*, 415.

4. ALLOWANCE OF COMPENSATION: APPEAL. The compensation of an administrator is not a matter within the discretion of the court having probate jurisdiction, and an appeal, therefore, will lie from the decision of such court as to its amount. *Ib.*

5. ———: EVIDENCE. Where the amount to be allowed to an administrator *pendente lite* is the matter under consideration, evidence of the compensation allowed by the court in a similar case is incompetent. *Ib.*

6. ———: ———. Evidence of the amount which, by compromise, the executor was to receive, or of the services to be performed by him, is, in such case, also incompetent. *Ib.*

7. ADMINISTRATOR'S SALE OF REAL ESTATE: AFFIDAVIT TO PETITION

FOR SALE. The fact that the affidavit to an administrator's petition for an order to sell real estate for the payment of debts is not made in literal compliance with the law, will not render the proceedings wholly void, (*following Rugle v. Webster*, 55 *Mo.* 246.) *Wilkerson v. Allen*, 502.

8. ——: APPROVAL AT ADJOURNED TERM. The approval of an administrator's sale of real estate at an adjourned term, instead of the regular term of the court, will not vitiate the sale, (*following Sims v. Gray*, 66 *Mo.* 613.) *Ib.*

9. ADMINISTRATOR'S DEED: FINAL SETTLEMENT by an administrator of his accounts, without resignation or discharge from his trust, does not deprive him of the power to execute a deed to real estate in consummation of a sale made and approved by the court before the settlement. *Ib.*

10. ——: The failure of an administrator to take security for the purchase money of real estate sold under an order of court, as required by the order, will not render his deed a nullity when the fact has been reported to the court and the sale has been approved notwithstanding. *Ib.*

11. MORTGAGE TO ADMINISTRATOR: DEED UNDER THE MORTGAGE. An administrator, upon a sale of real estate, received from the purchaser a mortgage with a power of sale, wherein he was described as administrator; *Held*, that he could not hold the land in that character, and that, upon a sale by him under the power, the execution of a deed by him, in his own right and character, was proper. *Ib.*

12. AN ADMINISTRATOR'S DEED, executed in pursuance of a sale held on a day when no court of record was in session, is void and passes no title to the purchaser. *Mobley v. Nave*, 546.

13. EJECTMENT AGAINST PURCHASER AT VOID ADMINISTRATOR'S SALE: MEASURE OF DEFENDANT'S RELIEF. In an action of ejectment by an heir against one who holds possession of land under a void sale made by the administrator of the ancestor, and who was at the time of his purchase from the administrator a judgment creditor of the estate, and as such entitled to a lien on the land, before the plaintiff can recover, the defendant will be allowed the amount of the purchase money, with interest at 6 per cent. per annum, but not the amount of the judgment debt, with interest at the rate it bears. *Ib.*

14. HOMESTEAD OF WIDOW AND CHILDREN: ADMINISTRATION. Under the homestead law, as amended by the act of March 18th, 1875, (Acts 1875, p. 60,) real estate of a decedent, in which his widow and minor children have a right of homestead, may be sold for the payment of his debts, subject to their right. The purchaser will be entitled to the possession when the widow dies and the children come of age. *Poland v. Vesper*, 727.

SEE DOWER, 1.

PRINCIPAL AND SURETY, 7.

PUBLIC ADMINISTRATOR.

ADVANCEMENT.[1]

See Pretermitted Heirs, 2.

ADVERSE POSSESSION.

1. Vendor and purchaser: landlord and tenant: adverse possession. One who holds land under a contract of purchase cannot, by accepting a lease from a stranger, convert his holding into an adverse possession as against his vendor; and if one so holding abandons the land and afterwards re-enters under a lease from a stranger without having rescinded his contract, and without any one having in the meantime taken possession, his re-entry will be held to relate back and continue the original possession, and not to create a new and adverse possession. *Pratt v. Canfield*, 50.

2. As between tenants in common: constructive possession. Where land, of which one was the sole owner in fee, and an interest in other land, of which he was the owner as one of several heirs, was conveyed by the same deed, and the grantee took actual possession of the land first mentioned, *Held*, that this did not give him constructive possession of the interests of the other heirs in the land last mentioned; and, although he paid taxes upon this land, and took stone and timber off it for building purposes, and made some rails and fed some cattle on it, *Held*, that these acts were entirely consistent with his interest, as a tenant in common in the land, and could not constitute adverse possession as against his co-tenants. *McQuiddy v. Ware*, 74.

3. Adverse possession: hostile entry: statute of limitations. When possession of land has been restored by legal process to one who had been deprived of it by an adverse claimant, the entry of the latter will not, in a subsequent action of ejectment, be allowed the effect of destroying the continuity of possession or of interrupting the running of the statute of limitations in favor of the former, if it was made with force and strong hand, nor unless suit was commenced upon it within one year after it was made, and within the time limited for bringing an action of ejectment. *Ferguson v. Bartholomew*, 212.

4. Mortgage: when possession is not adverse to mortgagee. When one enters upon land which is subject to a mortgage, under a contract with the mortgagor to pay off the mortgage debt, his possession is not adverse to that of the mortgagee. *Wilkerson v. Allen*, 502.

5. ——: adverse possession: pretermitted heirs. Where defendant in ejectment claims under a will by the terms of which the land was to become his absolute property upon the death of his mother, no possession which he may have held under the testator or afterwards during the life of his mother can be considered as adverse to pretermitted heirs of the testator. *McCracken v. McCracken*, 590.

ADVERTISEMENT.

See Deed of Trust, 5.

AMENDMENT.

1. Amendment of officer's return. A paper intended as an amended return of the marshal showing service of a notice will not be allowed to have effect as such unless made and filed by leave of court. *The State ex rel. Greely v. City of St. Louis*, 114.

2. Practice in supreme court: pleadings: amendments. Where leave to amend a pleading by interlineation has been granted by the trial court, the Supreme Court will regard the amendment as made, although the verbal changes may not actually have been made. *Underwood v. Bishop*, 374.

3. The allowance of amendments to pleadings is largely discretionary with the trial court, and this court will not interfere unless it is manifest that the discretion has been arbitrarily and unjustly exercised. *Enworth v. Barton*, 622.

See Practice, Criminal, 2.

Practice in Supreme Court, 1.

ANTE-NUPTIAL CONTRACT.

1. Ante-nuptial contract: deed in praesenti. An ante-nuptial contract provided that the intended wife was "to have one-third of one-half of the estate of her said intended husband, absolutely and in full property, and in lieu of dower, * * she hereby agreeing to and accepting the same," and further declared that "the said estate hereby given * * is to be in full of dower and any claim upon the estate" of the intended husband; *Held*, that these words operated to vest in the wife, upon the consummation of the marriage, a present estate in fee in one-sixth of her husband's lands. *Anglade v. St. Avit*, 434.

2. Exchange of mortgages: intervening estate: ante-nuptial contract. Where by the terms of an ante-nuptial contract the wife took an estate in fee in part of her husband's lands in lieu of dower, and after marriage he satisfied a mortgage upon his lands which was in existence at the date of the ante-nuptial contract with money raised by a new mortgage, *Held*, that the wife's estate was discharged from the first mortgage and was superior to the second. *Ib.*

APPEAL.

1. Party aggrieved. A purchaser of land at execution sale brought suit in the St. Louis circuit court to have a deed to the land, made by the execution debtor, set aside as fraudulent. Upon a hear-

ing, an interlocutory decree was entered, finding the issues for the plaintiff, and providing that the deed should be set aside unless the defendants should, within a time fixed, pay into court the amount of the execution debt and costs. This having been done, plaintiff's suit was dismissed. Thereupon both parties appealed to the general term of the circuit court, where the decree was reversed for the error of the court in permitting defendants to retain the land upon paying the debt, and the cause was remanded. That court had power, if it saw fit, to enter such a decree as the circuit court should have entered. Upon appeal taken by the plaintiff from the judgment of the general term, *Held*, that he was not aggrieved by that judgment, and had no right to appeal. *Kinealy v. Macklin*, 95.

2. APPEAL FROM ST. LOUIS COURT OF APPEALS TO SUPREME COURT. A suit to enjoin a sale of real estate under execution, upon the ground that such sale would cast a cloud upon the title, is not a case involving the title to real estate within the meaning of that clause of section 12, article 6, of the constitution of 1875, which declares that appeals shall lie from the decisions of the St. Louis court of appeals to the Supreme Court in all such cases. *The State ex rel. Haeussler v. Court of Appeals*, 199.

3. ALLOWANCE OF COMPENSATION TO ADMINISTRATOR. The compensation of an administrator is not a matter within the discretion of the court having probate jurisdiction, and an appeal, therefore, will lie from the decision of such court as to its amount. *Hawkins v. Cunningham*, 415.

4. JUSTICES' COURTS: NOTICE OF APPEAL: DEFAULT: DISMISSAL. A defendant, after the day of trial before a justice of the peace, took an appeal, but failed to give notice before the term after that to which the appeal was properly returnable. He subsequently gave notice, and at the following term, the plaintiff not appearing, had the case dismissed for want of prosecution; *Held*, that the defendant, and not the plaintiff, was in default, and the dismissal was error. The plaintiff was entitled to an affirmance. *Riddle v. Gillespie*, 627.

5. APPEAL BOND: SURETY: ADMINISTRATION. Until an appeal has been determined, the liability of a surety on the appeal bond is purely contingent, and, in case of his death, does not constitute a claim which the obligee may prove against his estate in the probate court. *Sauer v. Griffin*, 654.

SEE ADMINISTRATION, 2.

LINN COUNTY COURT OF COMMON PLEAS.

ASSAULT.

1. AN indictment which charges that defendant committed an assault upon another and pointed a loaded pistol at him, whereby his life was endangered, is good under section 33, page 450, of Wagner's Statutes, without an express allegation of intent to kill. *The State v. Hays*, 692.

2. ASSAULT, IN SUPPOSED DEFENSE OF A SON. It is no defense to an indictment for a felonious assault that the defendant was led to commit the assault by information, brought to him by others, that the person he assaulted was about to take the life of his son, when such was not the fact. It was his business, when he came upon the ground, to judge from what he saw whether the information was correct. *Ib.*

ASSAULT TO KILL.

1. AN INDICTMENT FOR AN ASSAULT TO KILL, though bad under sec. 29, Wag. Stat., p. 449, because it fails to charge that the offense was committed "on purpose," *Held*, good under sec. 32, Ib. The latter section does not require the use of those words. *The State v. McDonald*, 13.

2. AN INDICTMENT FOR AN ASSAULT TO KILL need not aver that defendant "had and held in his hand" the weapons with which he is charged to have made the assault. *Ib.*

3. AN INDICTMENT FOR AN ASSAULT TO KILL which alleges the offense to have been committed with three weapons—a pair of tongs, a hammer and an axe-handle—is not void as charging an impossibility. *Ib.*

4. ASSAULT TO KILL: STATUTORY OFFENSE: REQUISITES OF INDICTMENT. An indictment under Wagner's Statutes, section 32, page 449, for an assault with intent to kill, need not state what weapon was used in making the assault. The offense being a statutory offense, the indictment is good if it describes it in the language of the statute. *The State v. Chumley*, 41.

5. ASSAULT TO MAIM AND KILL: MAYHEM: RULES AS TO CONVICTIONS. The rule that, where it appears that a crime has actually been perpetrated, no conviction can be sustained for an attempt to perpetrate it, is not applicable to a case where one indicted for an assault with intent to maim, disfigure and kill is convicted of an assault with intent to kill upon evidence which proves an actual mayhem. The conviction of assault with intent to kill amounts to an acquittal of assault with intent to maim. *Ib.*

6. ASSAULT TO KILL: SUFFICIENCY OF INDICTMENT. An indictment for an assault with intent to kill, drawn under the 29th section of article 2, chapter 42, Wag. Stat., p. 449, which alleges that the assault was made with an axe and a gun, and that they were deadly weapons, is sufficient, without the further allegation that they were "likely to produce death." *The State v. Painter*, 84.

7. FACTS CONSTITUTING THE CRIME. There was evidence on the part of the State tending to prove that the defendant and one Andrews were in a blacksmith shop; that defendant went home, a short distance from the shop, and soon returned with a gun lying across his right arm, his left hand being on the cock of the gun, with the muzzle pointed towards the feet of Andrews, and said: "Bill Andrews, I am going to kill you, d—n your old soul;" that the gun was seized by a bystander, and the muzzle forced to the ground after it had been elevated by defendant so that it was pointed towards Andrews' body,

as high as his hips; *Held*, that such facts, if proven, would constitute an assault with intent to kill. *Ib.*

8. PRESUMPTION OF INTENT: EVIDENCE. The fact that one armed with a deadly weapon failed to shoot and kill another when he had an opportunity does not give rise to a presumption of law that he did not intend to do so. It is a circumstance to be considered by the jury in determining whether there was an assault or not. *Ib.*

9. INTENT TO ASSAULT. Neither a purpose to make an assault, nor any amount of preparation for doing so, unless followed by some hostile demonstration, will constitute an assault; a bare intent to commit an offense is not punishable by our law. *Ib.*

SEE COSTS, 1.

ASSENT.

SEE TOWNSHIP RAILROAD BONDS, 3.

ASSESSMENT OF BENEFITS.

SEE STREET OPENING, 1, 2, 3.

ATTORNEY AND CLIENT.

1. TRUSTS: LACHES. If an attorney at law, intrusted with the collection of a debt, is instructed by his client to buy, in his name, land of the debtor offered for sale under execution to satisfy the debt, but instead buys in his own name, without his client's knowledge, the latter will be entitled, upon returning the money received from the sale, to have it set aside and the title vested in himself. But if he becomes aware of the fact that the attorney has bought in his own name, he must assert his right promptly. If he permits eight years to elapse before bringing suit in a case where, in the meantime, the attorney has died, some of the land has been sold to strangers, and all has increased in value from seven to tenfold, he will be held guilty of such laches as will bar his claim. *Bliss v. Prichard*, 181.

2. RELIEVING PARTY AGAINST NEGLIGENCE OF HIS ATTORNEY. At the return term of this case defendant appeared in the trial court by his attorney, and obtained leave to answer within sixty days, during vacation. He instructed his attorney in all the details of his defense, but the latter left the State without filing the answer, and did not return. Discovering that no answer was filed, defendant employed another attorney, who, at the beginning of the next term and before any default had been taken, presented an answer embodying an apparently meritorious defense, and with it an affidavit setting forth the foregoing facts, and asked leave of the court to file the answer. This was refused, and the case was continued till the following term, when judgment was rendered against the defendant; *Held*, that although this court is reluctant to interfere with the discretion of trial courts in relieving or refusing to relieve parties against the negligence of their attorneys, yet, as the circumstances of this case in-

dicated no want of good faith on the part of the defendant, and no inconvenience to the plaintiff was likely to arise from it, the leave should have been granted, and the refusal was error requiring the reversal of the judgment. *Judah v. Hogan*, 252.

ATTORNMENT.

See Adverse Possession, 1.

BANK.

1. Liability of bank officer to depositor at common law. Aside from statutory or constitutional provisions, a director or officer of an incorporated bank is not individually responsible in an action at law for injury resulting to a creditor or depositor from the management of the bank, unless the injury is occasioned by his malicious or fraudulent act. *Fusz v. Spaunhorst*, 256.

2. ——— : under the constitution of 1875. Section 27, art. 12, constitution of 1875, which declares that "it shall be a crime, the nature and punishment of which shall be prescribed by law, for any president, director, manager, cashier or other officer of any banking institution to assent to the reception of deposits, or the creation of debts by such banking institution, after he shall have had knowledge of the fact that it is insolvent or in failing circumstances, and any such officer, agent or manager shall be individually responsible for such deposits so received and all such debts so created with his assent," *Held*, not to be self-enforcing. *Ib.*

BANK CHECK.

1. The state treasurer may pay a demand upon the treasury by a check upon a bank where he has money on deposit, that mode of payment being in accordance with immemorial commercial usage. *The State ex rel. Clark v. Gates*, 139.

2. Bank check for public funds: presentment for payment. When a county treasurer receives from the State treasurer a bank check for money due from the State to the county, it is his duty to make presentment for payment within a reasonable time, and if he neglects to do this, and before the check is paid the bank fails, the loss will fall upon himself. *Ib.*

3. State treasurer: security for state deposits in bank: county treasurer: failure to present check. The fact that a State treasurer has failed to comply with that provision of the constitution of 1875 which requires him to take security for State funds deposited in bank, will not relieve a county treasurer who has received a bank check from him, in payment of money due from the State to the county, from personal liability incurred by failure to present the check in time. *Ib.*

BILL OF EXCEPTIONS.

MOTIONS AND INSTRUCTIONS are no part of the record, and can only be made part of it by being incorporated bodily in a bill of exceptions. If not so incorporated, they can not be noticed by the appellate court. Mere reference to them in the bill by citing the page of the transcript on which they appear is insufficient. *Jefferson City v. Opel*, 394; *Robinson v. Hood*, 660.

BILLIARD TABLE.

1. BILLIARD TABLE LICENSE. A license to keep a billiard table takes effect from its delivery and not from its date, (following *The State v. Hughes*, 24 *Mo.* 151.) *The State v. Pate*, 488.

2. INDICTMENT FOR KEEPING A BILLIARD TABLE. An indictment which charges that the defendant kept, and permitted to be used and kept, a billiard table without license, is not bad as charging two distinct offenses, (following *The State v. Kesserling*, 12 *Mo.* 565.) *Ib.*

BOND.

1. DEVISEE NOT LIABLE ON BOND OF DEVISOR. A devisee is not liable on the bond of his devisor, as an heir is on that of his ancestor. This was the rule at common law, and it has not been altered by Wag. Stat., sec. 7, page 1352, or by any other statute of this State. *Sauer v. Griffin*, 654.

2. LIABILITY OF HEIR. An heir is not liable on the bond of his ancestor beyond the value of the estate descended. *Ib.*

CERTIORARI.

IN CERTIORARI PROCEEDINGS the determination of the question involved is to be made upon the return; facts can not be brought to the attention of the court outside of the return, (*following Han. & St. Jo. R. R. v. State Board*, 64 *Mo.* 294.) *House v. Clinton County Court*, 522.

SEE PRACTICE, CRIMINAL, 1.

CHECK.

SEE BANK CHECK.

CIRCUIT CLERK.

SEE CIRCUIT COURT.

COSTS, 3, 4.

CIRCUIT COURT.

RECORD BOOKS FOR CIRCUIT COURT. It does not come within the province of the county court to provide a judgment docket for the circuit court, or to contract for entering upon such docket satisfaction of the judgments rendered in the latter court. The law imposes these duties upon the circuit court and the circuit clerk. *Maupin v. Franklin County*, 327.

CITY ORDINANCE.

SEE MUNICIPAL CORPORATION, 1, 2.

COMMON CARRIER.

DELIVERY TO CARRIER CONSTRUCTIVE DELIVERY TO CONSIGNEE: DAMAGE TO GOODS IN TRANSIT: ACCEPTANCE AND WAIVER. The rule that delivery to the usual carrier, with proper instructions, is to be considered delivery to a consignee who has ordered goods from a distance, without giving special directions as to shipment, is applicable to a case where the goods shipped are not all of the particular grade ordered, if they have been received by the consignee with knowledge of the fact and without objection. In such a case, in the absence of any warranty by the consignor, he is not liable for damage to the goods occurring while they are in the hands of the carrier. Acceptance of the goods, with knowledge that they are damaged, is to be taken as a waiver of all objections on that score. *Graff v. Foster*, 512.

CONDEMNATION OF LAND.

1. CONDEMNATION OF RIGHT OF WAY: PRIOR CONTRACT FOR LOCATION OF A ROAD. The fact that a corporation, authorized to construct a macadamized road and to condemn land for that purpose, has contracted with the owner of a tract of land for the construction of its road across his land on an agreed line, and has partly constructed it on that line, is no bar to a proceeding by the corporation to condemn a right of way across the same land on a different line. The corporation may change the location of its road if it sees fit, subject to the right of the other party to recover such damages as he may sustain by reason of the breach of contract. *Cape Girardeau and Scott County Macadamized Road Company v. Dennis*, 438.

2. ———: EVIDENCE: DAMAGES: PRACTICE. It is the duty of the circuit court, on exceptions filed, to hear testimony, if offered, as to the adequacy of the compensation awarded land owners for land taken for the construction of roads. The Supreme Court will review the action of the circuit court only when the compensation is flagrantly excessive or inadequate. *Ib.*

3. ———: SECTION 1, PAGE 351, GENERAL STATUTES, 1865, applies to corporations created by special laws and authorizes them to condemn

land for road purposes. It does not apply exclusively to corporations created under the general law. *Ib.*

CONSIGNOR AND CONSIGNEE.

See Common Carrier, 1.

CONSTABLE.

1. An action under the statute (2 Wag. Stat., p. 844, sec. 19,) against a constable and his securities for failing to pay over money collected by him is properly brought in the name of the party aggrieved. *Ransom v. Cobb*, 375.

2. Judgment: interest. In such an action, recovery may be had (under sec. 22, p. 844, 2 Wag. Stat.,) of the amount for which the constable is delinquent, with interest thereon at the rate of one hundred per cent. per annum, but the judgment, after its date, can only bear interest at six per cent. per annum. (1 Wag. Stat., p. 783, sec. 3.) *Ib.*

CONSTITUTIONAL LAW.

1. Witnesses in crimimal cases. Section 3, p. 571, Wag. Stat., which provides that a person who shall bring into this State property stolen in another shall be punished in the same manner as if the theft had been committed here, is not in conflict with that provision of the constitution which guarantees to the accused compulsory process for his witnesses. That provision has reference only to such process as the State can execute within her own borders. The fact that the witnesses may be beyond the reach of her process can be no obstacle in the way of conviction. *The State v. Butler*, 59.

2. St. louis fire wardens: exemption from jury service: vested right. A member of the corporation of fire wardens of the city of St. Louis, who had served as such for seven years and received a proper certificate thereof before the passage of the act of May 15th, 1877, (Sess. Acts of 1877, p. 280,) was entitled, under the acts of 1845, (p. 114,) and 1851, (p. 481,) to exemption from service as a juror; his right to exemption had become vested, and it was beyond the power of the State, by subsequent legislation, to annul or abrogate it. *Ex parte Goodin*, 637.

See Bank, 2.

State Board of Equalization.

Taxes and Taxation, 2.

Texas Cattle.

Township Bonds.

CONSTRUCTIVE POSSESSION.

See Adverse Possession, 2.

CONTEMPT.

See Habeas Corpus.

CONTINUANCE.

The granting of a continuance rests largely in the discretion of the trial court, and every intendment is made in favor of its ruling. Its discretion must appear to have been unsoundly exercised before it will be interfered with by the Supreme Court.

The affidavit filed in support of the application for continuance in this case examined and *held* insufficient. *Leabo v. Goode*, 126.

See Practice, Criminal, 7.

CONTRACTS.

1. The maker and the guarantor of a promissory note are not jointly liable, and they cannot be sued jointly. *Graham v. Ringo*, 324.

2. A contract with a county court cannot be established by parol evidence; it is a court of record, and can only speak by its records. *Maupin v. Franklin County*, 327.

3. A verbal contract by a county court is not validated by the fact that the court has paid part of the money stipulated to be paid, and the work was afterwards completed, and was accepted and used by the county. *Ib.*

4. Devisee not liable on bond of devisor. A devisee is not liable on the bond of his devisor, as an heir is on that of his ancestor. This was the rule at common law, and it has not been altered by Wagner's Statutes, section 7, page 1352, or by any other statute of this State. *Sauer v. Griffin*, 654.

5. Liability of heir. An heir is not liable on the bond of his ancestor beyond the value of the estate descended. *Ib.*

6. Nudum pactum: consideration: delivery. One who becomes party to a note after it has once been delivered and the consideration has passed between the original parties, incurs no liability unless there is some new consideration and a redelivery of the note. The fact that he signs in the presence of the holder does not, by itself, amount to redelivery. *Williams v. Williams*, 661.

7. Part payment: consideration. Payment of the principal of a note does not constitute a good consideration for a promise to release the interest. *Willis v. Gammill*, 730.

SEE ANTE-NUPTIAL CONTRACT, 1.

SCHOOLS, 3.

STATUTE OF FRAUDS, 1, 2.

VENDOR AND VENDEE, 1, 2.

CORPORATION.

1. A JUDGE IS NOT DISQUALIFIED to sit at the trial of a case instituted by persons composing a committee of a corporation by reason of the fact that he is an honorary member of the corporation. *Bowman's Case*, 146.

2. STOCKHOLDER'S LIABILITY: POWERS OF SHERIFF ACTING AS RECEIVER. A sheriff, acting as receiver of the effects of a corporation by virtue of an appointment made by the court under Gen. Stat. 1865, secs. 20 and 21, p. 642, (Wag. Stat., p. 606,) has no power, by suit in his own name, to enforce the liability of a stockholder to the corporation for unpaid stock which is not due according to the terms of his subscription, and for which no call has been made by the directors. The subscription which creates his liability is not an evidence of indebtedness to the corporation within the meaning of these sections of the statute, and it is only evidences of indebtedness that they allow him to sue upon and collect. The power to enforce such liability cannot be conferred upon the sheriff by an order of court, or by an agreement among the judgment creditors of the corporation. *Hannah v. The Moberly Bank*, 678.

3. STOCKHOLDER'S LIABILITY, HOW ENFORCED: EXECUTION: GARNISHMENT. The liability of a stockholder in a bank for unpaid stock which is not due according to the terms of his subscription, and for which no calls have been made by the directors, cannot be seized and collected under an execution against the bank. In a proceeding at law for the satisfaction of a judgment, such liability can only be reached by a special execution awarded under the statute, against the stockholder himself, in default of assets of the bank whereon to levy. Gen. Stat. 1865, p. 328, sec. 11; Wag. Stat., p. 291, sec. 13. But if the stockholder is in default to the bank for installments due on his stock, or for calls made by the directors, he stands in the attitude of any other debtor to the bank, and his debt may be seized and collected by suit, under execution against the bank, or it may be reached by garnishment. *Ib.*

SEE COUNTY BONDS, 1, 2.

COSTS.

1. THE STATE'S LIABILITY FOR CRIMINAL COSTS. Under sec. 4, p. 349, Wag. Stat., the State is liable for costs, upon the acquittal of a defendant, only in a capital case, or in one in which imprisonment in

the penitentiary is the sole punishment. It is not liable upon the failure of a prosecution for assault with intent to kill for costs incurred, at the instance of the State, prior to the date of a continuance granted to the defendant at his cost, although an execution issued against him has been returned *nulla bona*. *The State ex rel. Spurlock v. Holladay*, 299.

2. COSTS: CONSTRUCTION OF STATUTES. All statutes in reference to costs must be strictly construed. An officer cannot legally claim remuneration unless the statute has expressly conferred the right. *Shed v. Kansas City, St. Joseph & Council Bluffs Railroad Company*, 687.

3. ——: SUBMISSION. The "submission," for which the circuit clerk is entitled to charge a fee of thirty-five cents, under Wag. Stat., sec. 10, p. 623, is not the ordinary submitting of a cause to the court or jury for final determination. It is the submitting of questions in difference to the court, without action, as authorized by Wag. Stat., sec. 25, p. 1056. *Ib.*

4. CIRCUIT CLERK'S COSTS. The court examines in detail a circuit clerk's fee bill, of which complaint is made in this case, and allows some items and rejects others. *Ib.*

SEE DRAMSHOP KEEPER, 2.

COUNTERFEIT NOTES.

1. COUNTERFEIT UNITED STATES NOTES: LIABILITY OF ONE PAYING THEM OUT. The holder of a bank check who receives from the bank in payment of the check a counterfeit United States treasury note, can recover of the bank the amount of the note, provided he offers to return it within a reasonable time after discovering the forgery. *Boyd v. Mexico Southern Bank*, 537.

2. WHAT IS A REASONABLE TIME within which a counterfeit note should be returned must necessarily depend on the situation of the parties and the facts and circumstances of each case, and is a question for the jury. *Ib.*

COUNTY BONDS.

1. THE COUNTY COURT OF GREENE COUNTY, without a vote of the people, by order of June 20th, 1870, subscribed $400,000 to the capital stock of Kansas City & Memphis Railroad Company. Order modified October 4th, 1870, so as to make subscription to Hannibal & St. Joseph Railroad Company, to aid in building the K. C. & M. R. R. April, 1871, order made rescinding former orders, and in July, 1871, order rescinding the rescinding order of April, 1871, and bonds issued, payable to H. & St. Jo. R. R. Co., bearer; *Held*, that as there was no acceptance by the latter company of the subscription, there was neither a contract nor a consideration for one, and that it was incompetent for the K. C. & M. R. R. Co. to accept the subscription. *The State ex rel. Wilson v. Garroutte*, 445.

2. THE AMENDATORY ACT of March 23d, 1861, (Sess. Acts 1860 and '61, p. 60, sec. 2,) prohibited such subscription after its passage, without such vote, to any railroad company, whether it had a pre-existing charter authorizing a subscription by counties or not. *City of St. Louis et al. v. Alexander*, 23 *Mo.* 483, strongly criticised and condemned.—Per SHERWOOD, C. J. *Ib.*

3. THERE IS NO VESTED RIGHT in a railroad company to a subscription until it be actually made, and until that event occurs the Legislature may alter the method whereby such subscription is to be made, without infringing any right. *Ib.*

4. THE REPEAL OF THE ACT of March 23d, 1861, by General Statutes of 1865, (R. C., p. 882,) did not revive the right to receive such subscription, contained in charter of railroad companies, repealed by former act. Neither could such subscription be made without a vote of the people, after passage of General Corporation Acts of 1865, (1 W. S., p. 305,) in accordance with provisions of sec. 17 of that act; and as the attempted subscription in case at bar was made after passage of this act, and without such vote, it was void under sec. 14, art. 11, of constitution of 1865.—Per SHERWOOD, C. J. *Ib.*

5. THE CONSOLIDATION of the Kansas City & Cameron Railroad Company, formerly Kansas City, Galveston & Lake Superior Railroad Company, under act of March 11th, 1867, "upon such terms as may be deemed just and proper," with H. & St. Jo. R. R. Co. did not operate to transfer to the latter company the franchises and unexecuted rights of former companies, so as to authorize a subscription to be made to H. & St. Jo. R. R. Co. without a vote of the people, and such subscription is void. The effect of consolidation under the act was to work the extinction of the original company in whose favor the subscription was authorized to be made, and the power to subscribe to the original company perished with the company to which it was attached, and in such case there could be no innocent purchasers of the bonds. *Ib.*

8. NAPTON AND HOUGH, JJ., dissented on the ground that this subscription was declared valid by this court in the case of *The State ex rel. the Attorney-General v. Greene County Court*, (54 Mo. 540,) and the bonds issued in payment of it having obtained currency on the faith of that decision, it thereby became a rule of property, which is binding on the county and its citizens, and should not now be disturbed. *See Clark v. Wolf*, 29 Iowa 197; Freem. on Judgm., sec. 178. *Ib.*

SEE LEXINGTON & ST. LOUIS RAILROAD BONDS.

TOWNSHIP RAILROAD BONDS.

COUNTY CLERK.

SEE MANDAMUS, 1.

COUNTY COLLECTOR.

See Taxes and Taxation, 3.

COUNTY CONTRACT.

See County Court.

COUNTY COURT.

1. Power to take security. A county court may lawfully take from a delinquent county officer, by way of security for his delinquency, a bond and mortgage on real estate, notwithstanding he has already given an official bond, and the sureties in the bond are perfectly solvent. *Turner v. Clark County*, 243.

2. A contract with a county court cannot be established by parol evidence; it is a court of record, and can only speak by its records. *Maupin v. Franklin County*, 327.

3. A verbal contract by a county court is not validated by the fact that the court has paid part of the money stipulated to be paid, and the work was afterwards completed, and was accepted and used by the county. *Ib.*

4. County court: record books for circuit court. It does not come within the province of the county court to provide a judgment docket for the circuit court, or to contract for entering upon such docket satisfaction of the judgments rendered in the latter court. The law imposes these duties upon the circuit court and the circuit clerk. *Ib.*

See Mandamus, 2.

COUNTY PLAT.

1. County plat: evidence. A county plat to which is appended a certificate in these words: "U. S. Land Office, Springfield, Mo. I hereby certify that the within plat is a correct abstract of the records in this office. J. S. W., Register," is properly certified within the meaning of sec. 11, p. 591, Wag. Stat., and is receivable in evidence. *Wilhite v. Barr*, 284.

2. ——: ——. When an entry has been properly made and certified on a county plat by a United States register of lands, the fact that he subsequently makes other entries on the same plat will not affect the validity of the first. *Ib.*

COUNTY TREASURER.

1. BANK CHECK FOR PUBLIC FUNDS: PRESENTMENT FOR PAYMENT. When a county treasurer receives from the State treasurer a bank check for money due from the State to the county, it is his duty to make presentment for payment within a reasonable time, and if he neglects to do this, and before the check is paid the bank fails, the loss will fall upon himself. *The State ex rel. Clark v. Gates*, 139.

2. FAILURE TO PRESENT CHECK. The fact that a State treasurer has failed to comply with that provision of the constitution of 1875 which requires him to take security for State funds deposited in bank, will not relieve a county treasurer who has received a bank check from him, in payment of money due from the State to the county, from personal liability incurred by failure to present the check in time. *Ib.*

3. NEW BOND REQUIRED WHEN OLD BOND IS INSUFFICIENT: RELEASE OF SURETIES IN OLD BOND: VOLUNTARY BOND. The additional security which sections 23, 24 and 25, p. 1306, Wag. Stat., make it the duty of the county court to require of a county treasurer when his official bond becomes insufficient, is a single bond in the sum of not less than $20,000. The acceptance of several bonds aggregating that sum is not a compliance with the law, and will not have the effect of releasing the sureties in the old bond. Such obligations will, however, be good as voluntary bonds, and the sureties in them will be liable for the treasurer's defalcations. *The State ex rel. Saline County v. Sappington*, 529.

4. EFFECT OF GIVING ADDITIONAL BOND. An additional bond given by a county treasurer, in obedience to an order of the county court, to secure the faithful performance of his official duties, does not secure the county merely against defalcations in excess of the amount of his original bond, but against any that may occur, and is to be treated as a concurrent security with the original. *Ib.*

COURTS.

SEE CRIMINAL COURTS.

LINN COUNTY COURT OF COMMON PLEAS.

ST. LOUIS COURT OF APPEALS.

COURT RECORDS.

1. MISTAKE IN COURT RECORDS, HOW CORRECTED: PAROL EVIDENCE is not admissible in a collateral proceeding for the purpose of showing that a court was in session on a day when the record of the court shows that it stood adjourned. A mistake in the record as to the date of the sitting must, like other mistakes in the record, be corrected by a direct proceeding for that purpose. *Mobley v. Nave*, 546.

2. POWER TO SUPPLY LOST INDICTMENT: STATUTES. No power to supply a lost indictment is given by sections 14 and 15, page 1137, Wag Stat. These sections prescribe the mode of supplying lost and destroyed records and papers in civil cases only. But the power exists, independent of any statute, and authorizes the court to allow a paper, proved to be a copy, to be filed as and for the indictment, provided it appears, either from the record or from the testimony of witnesses, that the indictment was returned into court and filed. Courts should, however, be careful in exercising this power. *The State v. Simpson*, 647.

CRIMINAL COURTS.

1. CRIMINAL COURT OF THE SIXTH JUDICIAL CIRCUIT AND JOHNSON COUNTY: TEMPORARY JUDGE. The judge of the criminal court of the sixth judicial circuit and Johnson county is the judge of a circuit within the meaning of section 29, article 6, of the constitution of 1875, and of the act of May 19th, 1877, (Acts 1877, p. 217,) and in the event of his absence the members of the bar in attendance may elect a temporary judge for the trial of causes, as prescribed by that act. *Ex parte Allen*, 534; *The State v. Miller*, 604.

2. ———. Where the 4th section of the act establishing that court provides, "all acts now in force, or that may hereafter be enacted, regulating the criminal practice and proceedings in courts of record, shall govern the proceedings in said criminal court so far as the same may be applicable," and where the Legislature, in conformity to the constitution, by a subsequent act made provision for supplying the place of a criminal judge in the event of his sickness, absence or inability to hold court, by selecting or electing an attorney to fill his place, it was held that such statutory provision was one "regulating the criminal practice and proceedings in courts of record," and therefore applicable to the criminal court of the sixth judicial circuit and Johnson county, according to the express terms of the 4th section aforesaid. *Ex parte Allen*, 534.

CRIMINAL LAW.

1. SELF-DEFENSE. A person threatened with attack is not required to wait until stricken, but may, in the exercise of the right of self-defense, strike first. *The State v. McDonald*, 13.

2. INTENT is an essential element of crime. An instruction, therefore, which declared that, when a crime is committed, the law presumes

the intent, *Held*, to be absurd and meaningless. *The State v. Painter*, 84.

3. POWER TO SUPPLY LOST INDICTMENT: STATUTES. No power to supply a lost indictment is given by Wagner's Statutes, sections 14 and 15, page 1137. These sections prescribe the mode of supplying lost and destroyed records and papers in civil cases only. But the power exists, independent of any statute, and authorizes the court to allow a paper, proved to be a copy, to be filed as and for the indictment, provided it appears, either from the record or from the testimony of witnesses, that the indictment was returned into court and filed. Courts should, however, be careful in exercising this power. *The State v. Simpson*, 647.

SEE ASSAULT TO KILL.

CUMULATIVE SENTENCES.

EVIDENCE, 1, 2, 3.

NEW TRIAL, 1.

WITNESS, 1.

CUMULATIVE SENTENCES.

STATUTE CONSTRUED. Where a prisoner is convicted on the same day under two distinct indictments, and is separately sentenced under each to a term of imprisonment in the penitentiary, the terms are not concurrent, but one commences when the other ends, and the prisoner is not entitled to be discharged until both have expired. Wag. Stat., p. 513, sec. 7, (*following Ex parte Turner*, 45 *Mo.* 331.) *Williamson's Case*, 174.

CURATOR.

NEXT FRIEND: WAIVER: JEOFAILS. A curator may bring a suit for his ward; but if it were necessary that it should be brought by next friend, the objection would be deemed waived unless taken by demurrer or answer, and, after verdict for the plaintiff, the error would be cured by the statute of jeofails. Wag. Stat., sec. 19, p. 1036. *Robinson v. Hood*, 660

DAMAGES.

1. NEGLIGENCE: EMPLOYER AND EMPLOYEE: DAMAGE ACT CONSTRUED: EVIDENCE. An action by the legal representatives of a deceased person, under the third section of the damage act, (Wag. Stat., p. 520,) can only be maintained where the deceased, had he survived, could have recovered damages for the injury; and the same evidence as to the cause of the injury is required in the one case as in the other; proof of the fact that the employee was injured or killed in consequence of the use of defective machinery will not, of itself,

make out a case against the employer. It must also be shown that the employer was aware of the defect, or that, by the use of reasonable care on his part, it would have been discovered. *Elliott v. St. Louis & Iron Mountain R. R. Co.*, 272.

2. DAMAGES, SPECULATIVE AND REMOTE: A LEASE of an opera house, with its scenery and appurtenances, contained a stipulation that if the lessee should, during the term, pay all back rents accrued under a former lease of the same premises, they should be restored to him under that lease, with all the rights and immunities thereof. The lessee was never put in possession under the new lease, and never paid up the back rents. In a suit against the lessor on the new lease for withholding possession, the lessee claimed to recover the value of the old lease, as well as the new, on the ground that by withholding the possession the lessor had deprived him of the means of earning the money to pay up the back rents, and had thus prevented the restoration of the old lease; *Held*, that this was purely speculative and too remote to constitute an element of damages. *Wilson v. Weil*, 399.

3. DAMAGES: AN INSTRUCTION which fails to limit the amount of damages that may be assessed by the jury to that claimed in the petition is objectionable. *Crews v. Lackland*, 619.

4. LOCOMOTIVE SCATTERING SPARKS: PROXIMATE AND REMOTE CAUSE: NEGLIGENCE. Sparks escaping from a railroad locomotive set fire to the prairie adjoining the company's right of way at a place where the grass was very rank and dry. The wind being high, the fire extended some three miles before night, and continued to burn during the night, though slowly, the wind having fallen. The following morning the wind rose again and blew with great violence, carrying the fire some five miles further, in the course of a few hours, to the plaintiff's farm, where it swept over a fire-line of sixteen feet of plowed ground, and destroyed plaintiff's property. Such violent winds were not unfrequent in that country. In an action of damages against the company, *Held*, that as the rise of the wind was a thing which a prudent man might reasonably have anticipated, it could not be regarded as the intervention of a new agency, so as to relieve the company from the consequences of its negligence in permitting the fire to escape; and as the fire was, in fact, one continuous conflagration, notwithstanding the lapse of time and the great distance over which it traveled before reaching plaintiff's property, a judgment in his favor was affirmed. *Poeppers v. Missouri, Kansas & Texas Railway Company*, 715; *Hightower v. Missouri, Kansas & Texas Railway Company*, 726.

SEE CONDEMNATION OF LAND, 2.

DRAMSHOP KEEPER, 2.

PARENT AND CHILD, 4.

RAILROAD, 2.

ROAD, 1.

DEBTOR AND CREDITOR.

See Subrogation.

DEED.

1. The rule in shelley's case was in force in this State in 1836, and a conveyance then made, *habendum* to A during his natural life for his use and benefit, and, after his death, in fee-simple to his heirs, vested in A an estate in fee. *Muldrow v. White*, 470.

2. Tax deeds: essential recital. Section 217, p. 1205, Wag. Stat., requires the date of the execution or order of the county court authorizing the sale of land for the non-payment of taxes to be recited in the deed executed in pursuance of the sale; the absence of this recital is fatal to its validity. *Williams v. McLanahan*, 499.

3. Creation of married woman's separate estate. The words designed to create a separate estate for a married woman need not appear in the granting clause or in the *habendum* clause of the deed. Equity looks to the intention—will glean it, if possible, from the four corners of the instrument, and will not allow it to fail by reason merely of the accidental mislocation of words. A deed running as follows: This deed, made and entered into, &c., by and between A, party of the first part, and B, wife of C, to her sole and separate use and benefit, party of the second part, witnesseth, &c., *Held*, to create a separate estate in B as fully as if the words "to her sole and separate use and benefit" had appeared in the granting or *habendum* clause. *Morrison v. Thistle*, 596.

See Ante-Nuptial Contract, 1.

Equity, 4.

Record of Deed, 1.

DEED OF TRUST.

1. Sale under deed of trust: enforcement of equities: innocent purchaser: notice. An agreement between the owner of land sold under a deed of trust and the purchaser at the sale, for a reconveyance as soon as a debt due from the former to the latter shall have been paid out of the rents, cannot be enforced against a grantee of the purchaser who has bought without notice of the agreement, paid a substantial part of the purchase money in cash, and given his negotiable promissory notes for the remainder. But it might be otherwise if, at the time of the trial, the notes remained in the hands of the first purchaser. *Digby v. Jones*, 104.

2. Deed of trust sale: suit to redeem: statement of account: interest. In a suit by the grantor in a deed of trust against the beneficiary to enforce an agreement for the redemption of improved real estate, purchased by the latter at a sale under the deed, and subsequently sold by him to a third party, the court having found

that the plaintiff was entitled to recover, *Held*, that an account should be stated charging defendant with the rents collected by him while he held the property, and its value at the date of the second sale, and crediting him with all taxes and necessary and reasonable repairs put upon the property, and with other necessary expenses incurred in its management, together with the amount due on the original indebtedness, and upon the balance so ascertained to be due at the date of the second sale interest should be allowed from that time. *Jones v. Real Estate Saving Institution*, 109.

3. PLEADING: MISJOINDER OF CAUSES OF ACTION. In an action by the grantors in a deed of trust against the trustee and the holder of the notes secured by the deed, for refusing to release the lands covered by the deed after the payment of the notes, the petition stated that the plaintiffs were thereby prevented from selling the lands at remunerative prices, and in the meantime they had greatly depreciated in value, to plaintiffs' damage $1,000; that, owing to the existence of this apparent incumbrance, plaintiffs were unable to meet their pecuniary liabilities, so that judgments were obtained against them, and the lands were sold under executions at a sacrifice, to plaintiffs' damage $500; and further, that by virtue of the statute defendants had become liable to pay plaintiffs ten per cent. on the amount of the notes. There was but one prayer for judgment, and that was for the aggregate sum of the damages and the penalty. On demurrer to this petition for misjoinder of causes of action, *Held*, that the claims for damages constituted one cause of action, and the claim for the penalty another, and they should have been set out in separate counts. *Scott v. Robards*, 289.

4. EXCHANGE OF MORTGAGES: INTERVENING ESTATE: ANTE-NUPTIAL CONTRACT. Where by the terms of an ante-nuptial contract the wife took an estate in fee in part of her husband's lands in lieu of dower, and after marriage he satisfied a mortgage upon his lands which was in existence at the date of the ante-nuptial contract with money raised by a new mortgage, *Held*, that the wife's estate was discharged from the first mortgage, and was superior to the second. *Anglade v. St. Avit*, 434.

5. SALE UNDER A MORTGAGE: PROOF OF NOTICE. When a deed executed by a mortgagee, in pursuance of a sale under the mortgage, is assailed on the ground that there was no proper advertisement of the place of sale, if the deed contains no recital showing what place was named in the hand-bills by which notice of the sale was given, and the hand-bills are lost, parol evidence is admissible for the purpose of supplying the proof. *Wilkerson v. Allen*, 502.

6. MORTGAGE: WHEN POSSESSION IS NOT ADVERSE TO MORTGAGEE. When one enters upon land which is subject to a mortgage, under a contract with the mortgagor to pay off the martgage debt, his possession is not adverse to that of the mortgagee. *Ib.*

7. MORTGAGE TO ADMINISTRATOR: DEED UNDER THE MORTGAGE. An administrator, upon a sale of real estate, received from the purchaser a mortgage with a power of sale, wherein he was described as administrator; *Held*, that he could not hold the land in that character, and that, upon a sale by him under the power, the execution of a deed by him, in his own right and character, was proper. *Ib.*

8. COUNTY COURT: POWER TO TAKE SECURITY. A county court may lawfully take from a delinquent county officer, by way of security for his delinquency, a bond and mortgage on real estate, notwithstanding he has already given an official bond, and the sureties in the bond are perfectly solvent. *Turner v. Clark County*, 243.

SEE COUNTY COURT, 1.

EXECUTION, 2.

GARNISHMENT, 2.

HOMESTEAD, 2.

DEPOSITIONS.

SEE NEW TRIAL, 1.

DESCRIPTION.

SEE SHERIFF'S DEED, 1.

DEVISOR AND DEVISEE.

SEE BOND, 1.

DOWER.

ESTOPPEL AGAINST A CLAIM OF DOWER. A widow entitled to a dower interest in a city lot, and, although otherwise advised, believing that she had an interest therein, authorized proclamation to be made, at a public sale, for payment of debts by the administrator of her deceased husband, that she did not, and would not, claim dower in the lot, and that it was clear of dower. Relying upon the truth of this public announcement, which was made in the hearing of the widow, the purchaser bid the full value of the lot; *Held*, in a suit by her for admeasurement of dower, that these facts amounted to an estoppel *in pais*, and precluded her recovery. *Hart v. Giles*, 175.

DRAMSHOP KEEPER.

1. DRAMSHOP KEEPER: PARENT AND CHILD: PLEADING. In an action by a parent against a dramshop keeper for selling intoxicating liquors to his minor child without the consent of such parent, under the statute (1 Wag. Stat., p. 552, sec. 20,) it is not necessary to allege in the petition the peculiar kind of liquor so sold. *Edwards v. Brown*, 377.

2. ——: ——: BOND FOR COSTS. Such an action is neither a *qui tam* action, nor an action on a penal statute where the penalty is given to the informer, and, therefore, does not come within the provisions of the statute (1 Wag. Stat., p. 341, § 1,) requiring a bond for costs to be filed before, or at the time of, the filing of the information in such cases. It is merely a suit for damages provided by the Legislature as a compensation to the aggrieved parent. *Ib.*

EJECTMENT.

1. AGAINST PURCHASER AT VOID ADMINISTRATOR'S SALE: MEASURE OF DEFENDANT'S RELIEF. In an action of ejectment by an heir against one who holds possession of land under a void sale made by the administrator of the ancestor, and who was at the time of his purchase from the administrator a judgment creditor of the estate, and as such entitled to a lien on the land, before the plaintiff can recover, the defendant will be allowed the amount of the purchase money, with interest at six per cent. per annum, but not the amount of the judgment debt, with interest at the rate it bears. *Mobley v. Nave*, 546.

2. PRETERMITTED HEIRS may maintain ejectment for their inheritance. *McCracken v. McCracken*, 590.

3. EJECTMENT: GENERAL ISSUE: EVIDENCE OF ADVANCEMENTS. Where plaintiffs in ejectment claim as pretermitted heirs, defendant will not be allowed to show under the general issue that they have received advancements and that he has made improvements on the land. To be available for any purpose, these facts must be pleaded. *Ib.*

SEE EQUITY, 2, 3.

LIMITATIONS, 5.

SWAMP LANDS, 2.

ELECTION.

SEE TOWNSHIP BONDS, 2, 3, 7.

EQUITY.

1. DEED OF TRUST SALE: SUIT TO REDEEM; STATEMENT OF ACCOUNT: INTEREST. In a suit by the grantor in a deed of trust against the beneficiary to enforce an agreement for the redemption of improved real estate, purchased by the latter at a sale under the deed, and subsequently sold by him to a third party, the court having found that the plaintiff was entitled to recover, *Held*, that an account should be stated charging defendant with the rents collected by him while he held the property, and its value at the date of the second sale, and crediting him with all taxes and necessary and reasonable repairs put upon the property, and with other necessary expenses incurred in the management, together with the amount due on the original indebtedness, and, upon the balance so ascertained to be

due at the date of the second sale, interest should be allowed from that time. *Jones v. Real Estate Saving Institution*, 109.

2. EXECUTION SALE IN VIOLATION OF COMPROMISE AGREEMENT: EJECTMENT. It is a good equitable defense to an action of ejectment for land claimed by the plaintiff by virtue of a purchase at execution sale, that the sale was made in violation of a compromise agreement of which the plaintiff was aware, and which he was charged with the duty of executing. *Nesbit v. Neill*, 275.

3. CASE ADJUDGED. A judgment having been obtained against an administrator and his securities, an agreement in writing between the plaintiffs and the securities was prepared, by which the latter were to pay part of the judgment, but no more unless the remainder could not be made out of the estate of the principal. One of the securities, (the defendant in the present action,) who perhaps had not signed the agreement, had, however, accepted it, and had paid his proportionate share of the amount agreed upon, and the assets of the principal, then in bankruptcy, were more than sufficient to pay the remainder of the judgment. The plaintiff in the present action not only had notice of these facts, but was the person selected by all the parties to the judgment to see that the terms of the compromise were respected, and, as assignee of the principal, was in possession of his assets. He procured the issuance of an execution upon the judgment, and at the sale thereunder purchased the land of the defendant. In an action of ejectment by him for this land, *Held*, that these facts constituted an equitable defense to the action; that it was immaterial whether the defendant had signed the agreement or not; having paid his share of liability under it, he was entitled to its benefits; that the vitality of the judgment was suspended by the compromise, and an execution issued while it was suspended had no more effect than one issued on a satisfied judgment. *Ib.*

4. CONFLICTING EXECUTION TITLES: EQUITY FOR REIMBURSEMENT OF PURCHASE MONEY AND TAXES: MISTAKE. A tract of land which had been conveyed by an erroneous description was levied upon successively by two judgment creditors of the purchaser, and each bought at his own sale. The levy of the first creditor was made after his execution had expired, and the sheriff's deed therefore conveyed no title. He, however, took possession, and for several years paid the taxes. Afterwards, to protect himself against the other creditor, whose proceedings had been regular, he procured from the heirs of the original owner a deed conveying the land by a correct description. In an equitable proceeding to settle the title, *Held*, that the second creditor was entitled to a decree vesting in himself the title so acquired by the other, and this without making compensation for the cost of acquiring it or the taxes he had paid. *Davison v. Robertson*, 208.

5. EJECTMENT AGAINST PURCHASER AT VOID ADMINISTRATOR'S SALE: MEASURE OF DEFENDANT'S RELIEF. In an action of ejectment by an heir against one who holds possession of land under a void sale made by the administrator of the ancestor, and who was at the time of his purchase from the administrator a judgment creditor of the estate, and as such entitled to a lien on the land, before the plaintiff can recover, the defendant will be allowed the amount of the purchase money, with interest at six per cent. per annum, but not the amount

of the judgment debt, with interest at the rate it bears. *Mobley v. Nave*, 546.

6. PROMISSORY NOTE: SET-OFF: PARTERSHIP: EQUITABLE RELIEF. An answer to a suit upon a promissory note, against the maker and indorser, averred that the note grew out of certain partnership transactions between plaintiff and one of the defendants, which had proved unsuccessful, that it was indorsed by the other defendant with the understanding that it was to be paid only in the event the partnership turned out prosperously; that the accounts of the concern were still unsettled, and the maker of the note had paid more than his share of the losses. There was a prayer that the excess of his payments might be allowed as a set-off against the note, and for judgment for the balance. It was not averred that plaintiff was insolvent, and no other ground for equitable relief was stated; neither was an account of the partnership affairs stated or prayed for. *Held*, that the answer did not state a good defense for either defendant. *Jones v. Shaw*, 667.

SEE ATTORNEY AND CLIENT, 1.

DEED OF TRUST, 1.

SUBROGATION.

UNDUE INFLUENCE, 1, 2.

ESTOPPEL.

ESTOPPEL AGAINST A CLAIM OF DOWER. A widow entitled to a dower interest in a city lot, and, although otherwise advised, believing that she had an interest therein, authorized proclamation to be made at a public sale, for payment of debts by the administrator of her deceased husband, that she did not, and would not, claim dower in the lot, and that it was clear of dower. Relying upon the truth of this public announcement, which was made in the hearing of the widow, the purchaser bid the full value of the lot; *Held*, in a suit by her for admeasurement of dower, that these facts amounted to an estoppel *in pais*, and precluded her recovery. *Hart v. Giles*, 175.

SEE INSTRUCTIONS, 1.

ESCROW.

A note cannot be treated as an escrow after it has been delivered to the payee. In order to have that effect, the delivery must be to a third person. *Jones v. Shaw*, 667.

EVIDENCE.

1. EVIDENCE. Upon the trial of a person jointly indicted with another, the prosecution will not be permitted to show that the latter is in the penitentiary of another State. *The State v. English*, 136.

2. ———. When the prosecution has given evidence tending to prove that the defendant went to the place where the crime was committed for the purpose of committing it, the defendant will be allowed to show that he went thither on legitimate business. *Ib.*

3. EVIDENCE that the defendant stole property of Peter Sinish will not sustain an indictment for stealing property of John Peter Sinish. *Ib.*

4. HEARSAY EVIDENCE. Testimony of statements made by one not a party to the suit, and not made in the presence of a party, is hearsay evidence and inadmissible; and, if material, its admission is a reversible error. *O'Neil v. Crain*, 250.

5. CRIMINAL LAW: JOINING MINOR IN MARRIAGE: PROOF OF AGE. Upon the trial of an indictment for joining a minor in marriage without her parent's consent, testimony as to her size, appearance and general development will not be received for the purpose of proving her age, if that is susceptible of direct proof. *State v. Griffith*, 287.

6. PROOF OF HANDWRITING. When the genuineness of a written instrument is the subject of investigation, it is not competent to prove the execution of other papers having no connection with the case, and then, by the testimony of experts, who have compared them with the instrument in question, to show that the latter is a forgery. *The State v. Clinton*, 380.

7. CRIMINAL LAW: DEFENDANT AS A WITNESS: IMPEACHMENT. If a defendant in a criminal case becomes a witness in his own behalf, as permitted by the act of April 18th, 1877, (Acts of 1877, p. 356,) he thereby subjects himself to the same rules as to cross-examination and impeachment as other witnesses. *The State v. Clinton*, 380; *The State v. Cox*, 392.

8. IN FORCIBLE ENTRY AND DETAINER. In order to maintain an action of forcible entry and detainer, proof must be made that the defendant was in possession of the premises at the time of the bringing of the suit. *Armstrong v. Hendrick*, 542.

9. WILLS: EVIDENCE. When a question of testamentary capacity is submitted to a jury, it is proper to put them in possession of all the facts relating to the condition of all the property of the deceased, and for this purpose evidence is admissible to show what amount of taxes are imposed and paid upon it. *Young v. Ridenbaugh*, 574.

10. PROMISSORY NOTE: PAROL EVIDENCE OF CONTEMPORANEOUS AGREEMENT: PARTNERSHIP. Parol evidence is not admissible for the purpose of showing that a promissory note, absolute by its terms, was only intended as evidence of the amount of money which had been advanced by plaintiff to aid in carrying on a partnership business, and which, it was agreed, was to be returned to plaintiff only in the event that the business should turn out prosperously. See *Rodney v. Wilson*, 123. *Jones v. Shaw*, 667.

11. PROOF OF ANCIENT RECORDED DEEDS: STATUES IN FORCE. Sections 35 and 36 of the chapter on evidence, (Wag. Stat., page 595,)

permitting a certified copy of a deed recorded thirty years before the first day of January, 1867, to be read in evidence without proof of the execution of the original, whether it was properly acknowledged or not, have not been repealed by the act of March 28th, 1874. (Acts 1874, page 59.) *Smith v. Madison*, 694.

See Administration, 5, 6.

Assault to Kill, 8.

Condemnation on Land, 2.

County Plat, 1.

Lands and Land Titles, 2.

Negligence, 2.

New Trial, 1.

Practice in Supreme Court, 2.

Promissory Note, 1.

Sheriff's Deed, 1.

Statute of Frauds, 1.

Township Bonds, 2, 7.

EXECUTION.

1. Judgment: execution: variance between them. A judgment contained a clause directing that the debt and damages recovered should be made of the goods and chattels of the debtor. The execution commanded the officer to make the judgment of the goods and chattels, and if sufficient could not be found, then of the lands and tenements of the debtor. The execution conformed to the law in force at the time. Under it lands were sold and a deed executed by the sheriff. This deed being assailed in ejectment on the ground of variance between the execution and the judgment, *Held*, that there was no real variance; 1st, Because the execution directed the officer to do precisely what was ordered by the judgment, only supplementing the judgment with the additional command to levy on lands and tenements in default of goods and chattels, as the law directed; 2nd, Because the law directed the mode of enforcement, and the direction contained in the judgment was superfluous and, viewed as a judicial decree, was void. *Houck v. Cross*, 151.

2. Judgment lien continued by execution. The issue and levy of an execution upon real estate, during the existence of the lien of the judgment, continues such lien until the writ can be duly executed; and a sale thereunder confers a better title than that under a deed of trust given after the inception of the judgment lien, but

prior to the issue and levy of the execution, (*following Bank v. Wells*, 12 *Mo.* 361.) *Durrett v. Hulse*, 201.

3. CONFLICTING EXECUTION TITLES: EQUITY FOR REIMBURSEMENT OF PURCHASE MONEY AND TAXES: MISTAKE. A tract of land which had been conveyed by an erroneous description was levied upon successively by two judgment creditors of the purchaser, and each bought at his own sale. The levy of the first creditor was made after his execution had expired, and the sheriff's deed therefore conveyed no title. He, however, took possession, and for several years paid the taxes. Afterwards, to protect himself against the other creditor, whose proceedings had been regular, he procured from the heirs of the original owner a deed conveying the land by a correct description. In an equitable proceeding to settle the title, *Held*, that the second creditor was entitled to a decree vesting in himself the title so acquired by the other, and this without making compensation for the cost of acquiring it or the taxes he had paid. *Davison v. Robertson*, 208.

4. STOCKHOLDER'S LIABILITY, HOW ENFORCED: EXECUTION: GARNISHMENT. The liability of a stockholder in a bank for unpaid stock which is not due according to the terms of his subscription, and for which no calls have been made by the directors, cannot be seized and collected under an execution against the bank. In a proceeding at law for the satisfaction of a judgment, such liability can only be reached by a special execution awarded under the statute, against the stockholder himself, in default of assets of the bank whereon to levy. Gen. Stat. 1865, p. 328, sec. 11; Wag. Stat., p. 291, sec. 13. But if the stockholder is in default to the bank for installments due on his stock, or for calls made by the directors, he stands in the attitude of any other debtor to the bank, and his debt may be seized and collected by suit, under execution against the bank, or it may be reached by garnishment. *Hannah v. The Moberly Bank*, 678.

5. EXEMPTION FROM EXECUTION: GARNISHMENT. The law exempting personal property from execution confers a personal privilege which the debtor alone may exercise. His debtor cannot assert it for him by way of defense to a garnishment proceeding. *Osborne v. Schutt*, 712.

SEE EQUITY, 2, 3.

GARNISHMENT, 2.

HOMESTEAD, 4.

LINN COUNTY COURT COMMON PLEAS.

TAX DEED.

EXECUTOR.

PUBLIC ADMINISTRATOR EXECUTING A WILL COLORE OFFICII: LIABILITY OF HIS SURETIES. A public administrator being named in a will as executor, without giving bond as such, and without giving

the notice required by Wag. Stat., p. 123, sec. 8, assumed control of the estate devised and executed the powers conferred by the will. The probate court recognized his acts as those of the public administrator. In a suit by a distributee to recover a share of the estate; *Held*, that he was chargeable as public administrator and not as executor or private administrator with the will annexed, and his sureties were liable accordingly. *The State to use of Betts v. Purdy*, 89.

EXEMPTIONS.

See Execution, 5.

Jury, 1, 2.

FARMING ON SHARES.

Does not constitute a partnership. The occupancy and cultivation by one of the farm of another, under an agreement that the crops raised shall be divided between them in a certain proportion, does not necessarily constitute them copartners. *Donnell v. Harshe*, 170.

FENCES.

See Railroads, 2.

FIRE WARDENS.

See Jury, 1.

FIXTURES.

A house, when personal property. A house erected under an agreement with the owner of the land that the builder shall have the right to remove it, is personal property as between the builder, or any one claiming under him, and the owner of the land, or any one purchasing from him with knowledge of the agreement. *Priestly v. Johnson*, 632.

FORCIBLE ENTRY AND DETAINER.

Evidence. In order to maintain an action of forcible entry and detainer, proof must be made that the defendant was in possession of the premises at the time of the bringing of the suit. *Armstrong v. Hendrick*, 542.

FORGERY.

1. UNDER SECTION 28, PAGE 1091, WAGNER'S STATUTE, an indictment for forging a promissory note is sufficient if it correctly states the purport of the instrument. It is not necesssry that that the date of the making or maturity shall be given. *The State v. Clinton*, 380.

2. PROOF OF HANDWRITING. When the genuineness of a written instrument is the subject of investigation, it is not competent to prove the execution of other papers having no connection with the case, and then, by the testimony of experts, who have compared them with the instrument in question, to show that the latter is a forgery. *Ib.*

3. COUNTERFEIT UNITED STATES NOTES: LIABILITY OF ONE PAYING THEM OUT. The holder of a bank check who receives from the bank in payment of the check a counterfeit United States treasury note, can recover of the bank the amount of the note, provided he offers to return it within a reasonable time after discovering the forgery. *Boyd v. Mexico Southern Bank*, 537.

4. WHAT IS A REASONABLE TIME within which a counterfeit note should be returned must necessarily depend on the situation of the parties and the facts and circumstances of each case, and is a question for the jury. *Ib.*

FRAUD.

SEE ADMINISTRATION, 1.

BANK, 1.

HUSBAND AND WIFE, 1.

FRAUDULENT CONVEYANCES.

1. SALE OF GOODS, CHANGE OF POSSESSION. The actual and continued change of possession, contemplated by the statute in relation to fraudulent conveyances, (1 Wag. Stat., sec. 10, p. 281,) must be open, notorious and unequivocal—such as to apprise the community, or those accustomed to deal with the vendor, that the goods sold have changed hands, and that the title has passed from the vendor to the vendee, (*following Claflin v. Rosenburg*, 42 *Mo.* 439, and other cases.) *Wright v. McCormick*, 426.

2. CASE ADJUDGED. If a purchaser of a stock of goods permits them to remain at the vendor's place of business, without removing his business sign, the change of possession is not unequivocal within the meaning of the foregoing rule, notwithstanding it may appear that when the sale was made the purchaser, in the presence and with the consent of the vendor, notified the vendor's clerks of the fact, and told them that in dealing with the goods in the future they were to act for him, and that the vendor was to have no further control over them, and that he did not, in fact, exercise any further control with the purchaser's consent. *Ib.*

GARNISHMENT.

1. DEED OF TRUST ON HOMESTEAD: GARNISHMENT OF SURPLUS PROCEEDS OF SALE. Judgment having been obtained against a man who was the head of a family, execution issued and was levied on the land on which he resided with his family, and it was sold under the execution without any attempt on his part to have a homestead set apart to him. Shortly before this the same land had been sold under a deed of trust, which he had given to secure the payment of a debt, for more than the amount of the debt. The judgment creditor having garnished the surplus in the hands of the purchaser to satisfy an unpaid balance of his execution, and the debtor having set up a claim to the same money as the proceeds of his homestead, *Held*, that the creditor was entitled to the money; 1st, Because the debtor had failed to claim his homestead at the proper time; 2nd, Because the law does not confer a homestead right in anything but land—not in the proceeds of the sale of land. *Casebolt v. Donaldson*, 308.

2. LAND TITLES: CONFLICTING PURCHASES: GARNISHMENT OF PROCEEDS. The land of a debtor was sold successively by two of his creditors—by one under execution, by the other under deed of trust. Each creditor purchased at his own sale—the judgment creditor for less than the amount of his debt, and the other for more than the amount of his debt. The judgment creditor having garnished the surplus of the purchase money in the hands of the other; *Held*, that it was the property of the common debtor, and the judgment creditor was entitled to have it applied in payment of the balance due him, no matter which sale carried the title to the land. *Ib.*

3. EXEMPTION FROM EXECUTION: GARNISHMENT. The law exempting personal property from execution confers a personal privilege which the debtor alone may exercise. His debtor cannot assert it for him by way of defense to a garnishment proceeding. *Osborne v. Schutt*, 112.

4. GARNISHMENT IN JUSTICE'S COURTS. No judgment can be entered against a garnishee in a justice's court, or in the circuit court on appeal from a justice, unless it appears that he owes the principal debtor. It is not sufficient that he has in his possession a promissory note belonging to the principal debtor. *Ib.*

SEE CORPORATION, 3.

GIFT.

A DEED OF GIFT FROM A PARENT TO HIS CHILD will not be set aside on the ground that it makes an unequal distribution of property among his children, when the parent had capacity enough to understand the value of the gift, and the condition and situation of those who had claims upon his bounty. *Moore v. Moore*, 192.

SEE HUSBAND AND WIFE, 1.

GRAND JURY.

1. GRAND JURY: ADJOURNED TERM. A grand jury summoned for a regular term of court has power to find indictments at an adjourned term unless discharged in the meantime. The order of adjournment does not have the effect of discharging them or putting an end to their powers. *The State v. Pate*, 488.

2. ———: An objection to the constitution of the grand jury by which a defendant was indicted, if available to him at all, comes too late when made, for the first time, in the Supreme Court. *Ib.*

GUARANTY.

THE MAKER AND THE GUARANTOR of a promissory note are not jointly liable, and they cannot be sued jointly. *Graham v. Ringo*, 324.

HABEAS CORPUS.

EXEMPTION FROM JURY SERVICE: CONTEMPT. A person who has been committed for contempt, in refusing to serve as a juror, is not entitled to be released on *habeas corpus*, notwithstanding the order of commitment shows upon its face that he is exempt by law from jury duty, and that he claimed his exemption. SHERWOOD, C. J., and HENRY, J., dissenting. *Ex parte Goodin*, 637.

HEIR.

SEE BOND, 2.

PRETERMITTED HEIR.

HOMESTEAD.

1. HOMESTEAD LAW: PRINCIPLES OF CONSTRUCTION. The homestead is a statutory right—a strictly legal right—and while the act should be liberally construed to effectuate its benign purpose, yet equitable principles, other than those recognized by the act, cannot be invoked by one claiming a homestead right. *Casebolt v. Donaldson*, 308.

2. DEED OF TRUST ON HOMESTEAD: SURPLUS PROCEEDS OF SALE: SETTING APART HOMESTEAD. Judgment having been obtained against a man who was the head of a family, execution issued and was levied on the land on which he resided with his family, and it was sold under the execution without any attempt on his part to have a homestead set apart to him. Shortly before this the same land had been sold under a deed of trust, which he had given to secure the payment of a debt, for more than the amount of the debt. The judgment creditor having garnished the surplus in the hands of the purchaser to satisfy an unpaid balance of his execution, and the debtor having set up a claim to the same money as the proceeds of his homestead, *Held*, that the creditor was entitled to the money;

1st, Because the debtor had failed to claim his homestead at the proper time; 2nd, Because the law does not confer a homestead right in anything but land—not in the proceeds of the sale of land. *Ib.*

3. HOMESTEAD OF HEIR AS AFFECTED BY ANCESTOR'S DEBT: SUBSTITUTED NOTE. The ancestor of defendants died indebted on a promissory note and seized of real estate, the title to which passed, by descent, to defendants, who at the time were adults, were heads of families and occupied the land. By arrangement between defendants and the holder of the note, he surrendered it and accepted their note in lieu of it. Judgment having been subsequently obtained against them upon this note, execution was levied upon the land and a sale was made. In ejectment by the purchaser at this sale, *Held*, that, as against him, defendants were not entitled to a homestead in the land. Being adults at the time of their ancestor's death, the property did not descend to them as a homestead, under Sec. 5 of the homestead law, (Wag. Stat., p. 698,) but came subject to the creditor's claim, and this was not extinguished by the substitution of their note for that of their ancestor. *Jackson v. Bowles*, 609.

4. HOMESTEAD: EXECUTION. As against a purchaser of land at execution sale, occupancy at the time of the sale is not alone sufficient to create a homestead in the head of a family. It must have existed at the time the levy was made. *Ib.*

5. HOMESTEAD OF WIDOW AND CHILDREN: ADMINISTRATION. Under the homestead law, as amended by the act of March 18th, 1875, (Acts 1875, p. 60,) real estate of a decedent, in which his widow and minor children have a right of homestead, may be sold for the payment of his debts, subject to their right. The purchaser will be entitled to the possession when the widow dies and the children come of age. *Poland v. Vesper*, 727.

HUSBAND AND WIFE.

1. GIFT TO WIFE: HUSBAND'S DEBTS: SET-OFF. Where, upon the sale of property of a married man, he takes from the purchaser a note payable to his wife, the note is *prima facie* evidence of a gift to the wife; and, if the gift is not fraudulent, under the act of 1875, (Acts 1875, p. 61,) it becomes her separate property, and in a suit upon the note, the indebtedness of the husband cannot be used as an off-set against it. *Richardson v. Lowry*, 411.

2. ANTE-NUPTIAL CONTRACT: DEED IN PRAESENTI. An ante-nuptial contract provided that the intended wife was "to have one-third of one-half of the estate of her said intended husband, absolutely and in full property, and in lieu of dower, * * she hereby agreeing to and accepting the same," and further declared that "the said estate hereby given * * is to be in full of dower and any claim upon the estate" of the intended husband; *Held*, that these words operated to vest in the wife, upon the consummation of the marriage, a present estate in fee in one-sixth of her husband's lands. *Anglade v. St. Avit*, 434.

3. MARRIED WOMAN, WHEN BOUND BY HER HUSBAND'S ACTS. If a deed is

made to a married woman in pursuance of a contract of purchase by the husband, and he pays the purchase money, she is bound by his acts done under and in pursuance of the contract. *Wilkerson v. Allen*, 502.

4. MARRIED WOMAN'S SEPARATE ESTATE, HOW CREATED. The words designed to create a separate estate for a married woman need not appear in the granting clause or in the *habendum* clause of the deed. Equity looks to the intention—will glean it, if possible, from the four corners of the instrument, and will not allow it to fail by reason merely of the accidental mislocation of words. A deed running as follows: This deed, made and entered into, &c., by and between A, party of the first part, and B, wife of C, to her sole and separate use and benefit, party of the second part, witnesseth, &c., *Held*, to create a separate estate in B as fully as if the words "to her sole and separate use and benefit" had appeared in the granting or *habendum* clause. *Morrison v. Thistle*, 596.

5. ———: HOW BOUND: BLANK NOTE. A married woman may bind her separate estate by a note executed in blank. *Ib.*

6. ———: WIFE'S NOTE PAYABLE TO HUSBAND. In equity, a note made by a wife payable to her husband is, in the hands of a third party, capable of enforcement as a charge against her separate estate. *Ib.*

7. WIFE, COMPETENCY AS A WITNESS: AGENCY. In order to make the testimony of a married woman admissible in a suit to which her husband is a party, on the ground that she acted as his agent in the transaction to which it relates, the fact of her agency must be shown by some competent witness, and she is not a competent witness for that purpose. *Chesley v. Chesley*, 54 Mo. 347, disapproved. *Williams v. Williams*, 661.

8. HUSBAND AND WIFE; WIDOW AS WITNESS. A widow is not a competent witness to prove an agreement made by her deceased husband. *Willis v. Gammill*, 730.

INFANCY.

1. STATUTE OF LIMITATION: TEN YEARS' ADVERSE POSSESSION is a bar to an action of ejectment brought by one who was a minor at the time the adverse possession commenced but attained his majority more than three years before the expiration of the ten-year period. *Gray v. Yates*, 601.

2 INFANCY: PRACTICE. It is competent for a court to permit one who comes of age pending a trial, to join in the suit as a co-plaintiff. *Robinson v. Hood*, 660.

3. CURATOR: NEXT FRIEND: WAIVER: JEOFAILS. A curator may bring a suit for his ward, but if it were necessary that it should be brought by next friend, the objection would be deemed waived, unless taken by demurrer or answer, and, after verdict for the plaintiff, the error

would be cured by the statute of jeofails. Wag. Stat., sec. 19, page 1036. *Ib.*

See Joining Minor in Marriage.

Partition, 1.

INJUNCTION.

1. Against Illegal taxation. Injunction is a proper remedy to prevent the collection of a tax levied in excess of the legal limit; but before the writ is granted the court should require the complainant to pay so much of the tax as is confessedly due. *Overall v. Ruenzi*, 203.

2. Measure of sureties' liability on injunction bond: action. The obligation of the sureties in a statutory injunction bond is not to pay all damages that the injunction may occasion to the defendant, but to pay such as the court shall, upon the dissolution of the injunction, adjudge against the plaintiff; and until they have been adjudged, no action can be maintained on the bond. *Dorriss v. Carter*, 544.

INNOCENT PURCHASER.

See Deed of Trust, 1.

Sheriff's Deed, 2.

INSTRUCTIONS.

1. Estoppel: practice. When a party asks instructions upon one theory of his case only, seemingly abandoning another which he has set up in his pleading, the Supreme Court will not grant him a reversal because the trial court failed to instruct the jury upon that theory. *Leabo v. Goode*, 126.

2. An instruction which either ignores a material fact in the case or is inconsistent with itself, is properly refused. *Seymour v. Seymour*, 303; *Jackson v. Bowles*, 609; *Crews v. Lackland*, 619.

3. Practice: suit on special contract: instruction for recovery on quantum meruit erroneous; waiver of the error. In a suit brought upon a special contract, alleged to have been faithfully kept by the plaintiff, an instruction at his instance was given, allowing him to recover on a *quantum meruit*. But, the court, also, at defendants' instance gave a series of instructions, based on the same theory as that contained in the instruction given for plaintiff. *Held* that, although such instruction was technically erroneous, the error was waived by its adoption at the trial by defendant. *Davis v. Brown*, 313.

4. INSTRUCTIONS are intended as guides for the jury, and should not be couched in technical language, but in plain, unambiguous terms, intelligible to the unlearned. They should not be so drawn as to make a legal argument necessary in order to ascertain what issues are submitted to the jury. *Young v. Ridenbaugh*, 574.

5. INSTRUCTIONS are properly refused when they are but repetitions of others already given, or ignore evidence in the case, or announce abstract propositions of law having reference to no facts in evidence. *The State v. Miller*, 604.

6. THE giving of an instruction which is not based upon any evidence in the case is a ground for the reversal of the judgment. *The State v. Little*, 624.

INSURANCE.

1. MARINE INSURANCE: PARTICULAR AVERAGE: PARTIAL LOSS. The memorandum clause, in an open policy of insurance on three barge loads of wheat, described the risk as 39,085 bushels, bulk wheat, at $1.15 per bushel—sum $44,945; rate, 1.; premium, $449.45; to be conveyed from Lansing to St. Louis by steamer and barges. In an action upon the policy, it was held that the wheat was insured in bulk and not in packages, either of one bushel or one barge each; that a clause in the policy, "Each package shall be subject to its own average," did not apply to such a risk; and that, in determining the percentage of partial loss, the proportion between the entire actual loss and the value of the entire shipment must be ascertained. *Haenschen v. The Franklin Insurance Company*, 156.

2. INSURANCE COMPANIES: WITHDRAWAL OF SECURITIES FROM STATE TREASURY: MANDAMUS. Under section 20, p. 769, Wag. Stat., an insurance company wishing to withdraw from the custody of the State Treasurer securities deposited with him in compliance with the act of March 23rd, 1874, (Acts 1874, p. 76,) must present a written order of the acting president and secretary, or of the directors of the company, endorsed by the Superintendent of the Insurance Department, or the order of some court of competent jurisdiction; and, until such order is presented, the treasurer will not be compelled by mandamus to surrender them.

This rule is not affected by the fact that in the State to which the petitioning company belongs foreign companies are not required to produce such order to enable them to regain their securities. *The State ex rel. Richmond Fire Association v. Gates*, 496.

INTEREST.

PROMISSORY NOTE. Ten per cent. interest will not be allowed on a note that does not call for that rate. *Williams v. Williams*, 661.

SEE CONSTABLE, 1.

EQUITY, 1.

JEOFAILS.

See Infancy, 3.

JOINING MINOR IN MARRIAGE.

Criminal law: proof of age. Upon the trial of an indictment for joining a minor in marriage without her parent's consent, testimony as to her size, appearance and general development will not be received for the purpose of proving her age, if that is susceptible of direct proof. *The State v. Griffith*, 287.

JUDGE.

A judge is not disqualified to sit at the trial of a case instituted by persons composing a committee of a corporation by reason of the fact that he is an honorary member of the corporation. *Bowman's Case*, 146.

JUDGMENT.

Lien continued by execution. The issue and levy of an execution upon real estate, during the existence of the lien of the judgment, continues such lien until the writ can be duly executed; and a sale thereunder confers a better title than that under a deed of trust given after the inception of the judgment lien, but prior to the issue and levy of the execution, (*following Bank v. Wells*, 12 *Mo.* 361.) *Durrett v. Hulse*, 201.

See Circuit Court.

Constable, 2.

Court Records, 1.

Execution, 1.

Partition, 5.

Practice, 4.

JUDICIAL SALE.

See Sheriff's Deed, 2.

JUDICIAL NOTICE.

See Officer, 1.

Principal and Agent, 1.

JURISDICTION.

Misjoinder of parties: practice Where two persons who are not jointly liable are joined as defendants in one action, if one of them resides and is served with process in a county other than that where the action is brought, the court acquires no jurisdiction over him; and if the misjoinder appears from the face of the petition, the question of jurisdiction may be raised after judgment. A plea to the jurisdiction before judgment is not necessary. *Graham v. Ringo*, 324.

JURY.

1. St. Louis fire wardens: exemption from jury service: vested right. A member of the corporation of fire wardens of the city of St. Louis, who had served as such for seven years and received a proper certificate thereof before the passage of the act of May 15th, 1877, (Sess. Acts of 1877, p. 280,) was entitled, under the acts of 1845, (p. 114,) and 1851, (p. 481,) to exemption from service as a juror; his right to exemption had become vested, and it was beyond the power of the State, by subsequent legislation, to annul or abrogate it. *Ex parte Goodin*, 637.

2. Habeas corpus: exemption from jury service: contempt. A person who has been committed for contempt, in refusing to serve as a juror, is not entitled to be released on *habeas corpus*, notwithstanding the order of commitment shows upon its face that he is exempt by law from jury duty, and that he claimed his exemption.—Sherwood, C. J. and Henry, J., dissenting.

See Practice, Criminal, 5.

JUSTICE'S COURTS.

1. Notice of appeal: default: dismissal. A defendant, after the day of trial before a justice of the peace, took an appeal, but failed to give notice before the term after that to which the appeal was properly returnable. He subsequently gave notice, and at the following term, the plaintiff not appearing, had the case dismissed for want of prosecution; *Held*, that the defendant, and not the plaintiff, was in default, and the dismissal was error. The plaintiff was entitled to an affirmance. *Riddle v. Gillespie*, 627.

2. Garnishment in justice's court. No judgment can be entered against a garnishee in a justice's court, or in the circuit court on appeal from a justice, unless it appears that he owes the principal debtor. It is not sufficient that he has in his possession a promissory note belonging to the principal debtor. *Osborne v. Schutt*, 712.

3. JUSTICE'S COURT: STATEMENT OF CAUSE OF ACTION. The statement in a case commenced before a justice of the peace charged that "defendant did wrongfully maim, wound and kill the hogs of plaintiff." The proof on the plaintiff's part was that defendant's dogs were fierce, and in the habit of worrying stock, and that defendant knew of their propensity. There was no evidence that he set them on, or knew that they were worrying plaintiff's hogs; *Held*, that the statement sufficiently set forth the plaintiff's cause of action. *Hale v. Van Dever*, 732.

LACHES.

1. ATTORNEY AND CLIENT: TRUSTS: LACHES. If an attorney at law intrusted with the collection of a debt, is instructed by his client to buy, in his name, land of the debtor offered for sale under execution to satisfy the debt, but instead buys in his own name, without his client's knowledge, the latter will be entitled, upon returning the money received from the sale, to have it set aside and the title vested in himself. But if he becomes aware of the fact that the attorney has bought in his own name, he must assert his right promptly. If he permits eight years to elapse before bringing suit, in a case where, in the meantime the attorney has died, some of the land has been sold to strangers, and all has increased in value from seven to ten fold, he will be held guilty of such laches as will bar his claim. *Bliss v. Prichard*, 181.

2. LACHES: PLEADING. If it appears by a petition in equity that the plaintiff has been guilty of laches in asserting his claim, the petition will be held bad on demurrer. If additional facts are pleaded with a view of excusing the delay, they must be definitely stated. Thus, it is not sufficient to say that the plaintiff was not aware of the facts upon which he bases his claim to equitable relief until a long time after they occurred. It must appear how long a time elapsed before he became aware of them. (HOUGH, J., dissenting.) *Ib.*

3. LACHES. Courts of equity discountenance laches, and deny aid to those who have slept upon their rights for such length of time that their assertion would be against good conscience and operate as a fraud. Mere lapse of time, however, short of the period fixed by the statute of limitations, will not bar a claim to equitable relief where the right is clear, and there are no countervailing circumstances.

Case adjudged. Nearly ten years had elapsed since the execution of a deed procured by undue influence; but, for a year afterwards, the grantor remained in the grantee's house, and under his influence, and then she became a *feme covert;* the grantee, too, had the right to use and occupy the land until the expiration of an existing life estate; suit was brought within three years after that event, and it was not clear that, prior to the suit, she was free from the delusion under which she made the deed; *Held*, that, under these circumstances, her inaction did not debar her from equitable relief. *Bradshaw v. Yates*, 221.

LAND AND LAND TITLES.

1. SPANISH LAND CLAIMS. The concession to Camp and Reilhe, by the Spanish Lieutenant-Governor, of date December 3rd, 1796, and a survey of the land so conceded on the 31st day of December, 1796, by the Spanish Surveyor-General, constitute a claim upon which the act of Congress of July 4th, 1868, relinquishing the title of the United States *to the legal representatives of C. & R.*, can operate; and there is no material difference between such a relinquishment and one *to C. & R., or their legal representatives.* *Harvey v. Rusch*, 551.

2. EVIDENCE OF SUCH CLAIM. The recitals of such concession and survey in a grant, complete in form, by the Spanish Intendant-General to C. & R., of the land so conceded, in fee simple, of date June 19th, 1802, although such grant be invalid because made after the treaty of St. Ildefonso, of October 1st, 1800, are evidence of the concession and survey sufficient to justify the operation of the act of 1868 as a confirmation. *Ib.*

3. M'NAIR V. HUNT, 5 MO. 300, AFFIRMED. It was virtually decided in McNair v. Hunt, 5 Mo. 300, that the respondents are the legal representatives of Reilhe, and this court declines to review that decision. *Ib.*

4. SPANISH LAND TITLES: TRANSFER TO THE UNITED STATES. An order of survey made by the Spanish Lieutenant-Governor in the year 1799, and a survey made in the same year in pursuance of the order, together with inhabitation and cultivation of the premises by the grantee and his family, did not vest in him a complete title. In order to pass this out of the Crown of Spain, certain formalities prescribed by the Intendant-General, under the authority of the royal order of October 22nd, 1798, had to be complied with. Where this had not been done, the title of the grantee remained inchoate, and the legal title passed, upon the acquisition of Louisiana, to the United States. *Smith v. Madison*, 694.

SEE RAILROADS, 1.

SWAMP LANDS, 1, 2.

LANDLORD AND TENANT.

SEE ADVERSE POSSESSION.

TRESPASS, 1.

LARCENY.

SEE WITNESS, 1

LEXINGTON & ST. LOUIS RAILROAD BONDS.

THE charter of the Lexington & St. Louis Railroad Company, (Acts 1859-60, p. 399,) the amendatory act of January 4th, 1860, (Ib., p. 400,) and the funding act of March 24th, 1868, (Acts 1868, p. 46,) taken together authorize the issue in payment of a county subscription to that company of bonds bearing interest at the rate of ten per cent. per annum payable semi-annually. *Webb v. Lafayette County*, 353.

LICENSE.

SEE BILLIARD TABLE, 1.

LIEN.

SEE JUDGMENT, 1.

LIMITATIONS.

1. ADVERSE POSSESSION: HOSTILE ENTRY: STATUTE OF LIMITATIONS. When possession of land has been restored by legal process to one who had been deprived of it by an adverse claimant, the entry of the latter will not, in a subsequent action of ejectment, be allowed the effect of destroying the continuity of possession or of interrupting the running of the statute of limitations in favor of the former, if it was made with force and strong hand, nor unless suit was commenced upon it within one year after it was made, and within the time limited for bringing an action of ejectment. *Ferguson v. Bartholomew*, 212.

2. STATUTE OF LIMITATION: NEW PARTIES: SUBROGATION. The administrator of a deceased sheriff having sued upon a note given to his intestate for the purchase money of land sold by him under a decree of court, the sureties of the deceased, who had been compelled to pay to the parties entitled the amount for which the land sold, claiming the right to be subrogated in place of the administrator, caused themselves to be substituted as plaintiffs in the action more than ten years after the maturity of the note, *Held*, that as they virtually commenced a new action—one in equity, instead of the action at law upon the note—they were barred by the statute of limitations, although the action, as originally brought, was not barred. *Sweet v. Jeffries*, 420.

3. WRITTEN PROMISE TO PAY. Ten years, and not five, is the period of limitation against a promise in writing to pay a sum of money to be subsequently ascertained. The five year limitation applies where the writing is of such a character that evidence *aliunde* is required to show a promise to pay. *Carr v. Thompson*, 472.

4. PART PAYMENT of a debt after the bar of the statute of limitation has attached, has the effect of removing the bar and reviving the cause of action. *Shannon v. Austin*, 485.

5. INFANCY: TEN YEARS' ADVERSE POSSESSION is a bar to an action of ejectment brought by one who was a minor at the time the adverse possession commenced, but attained his majority more than three years before the expiration of the ten-year period. *Gray v. Yates*, 601.

6. THE STATUTE OF LIMITATIONS does not begin to run in favor of one in the possession of land until the legal title has emanated from the Government. *Gibson v. Chouteau*, 13 Wall. 92, &c. *Smith v. Madison*, 694.

SEE ADVERSE POSSESSION.

LINN COUNTY COURT OF COMMON PLEAS.

EFFECT OF APPEAL: SUPERSEDEAS BOND: STAY OF EXECUTION. By the act establishing the Linn county court of common pleas, (Sess. Acts 1867, p. 93,) the circuit court is invested with appellate jurisdiction in cases arising in the common pleas, but it is provided that no appeal to the circuit court shall operate a stay of execution or other proceedings in the common pleas. A defendant having appealed from the judgment of the latter court to the circuit court, and from a judgment of affirmance there to the Supreme Court, gave a supersedeas bond to stay the execution of the judgment of the circuit court, as provided by the general law in relation to appeals, (Wag. Stat., p. 1069, § 45). Pending this appeal the plaintiff caused an execution to issue from the common pleas on the judgment there. On motion to quash, *Held*, that plaintiff was not entitled to the execution until the determination of the appeal in the Supreme Court. *Pratt v. Canfield*, 48.

LOST INDICTMENT.

SEE COURT RECORDS, 2.

LOUISIANA CITY ATTORNEY.

LOUISIANA CITY CHARTER: CITY ATTORNEY: MEANING OF THE WORD "MAY." The charter of the city of Louisiana, (Acts 1870, p. 394,) creates the office of City Attorney and gives the Mayor power to nominate, and, with the consent of the council, to appoint all city officers not ordered by the act to be otherwise appointed. Section 10, article 4, declares that the council *may*, by ordinance, provide for the election by the qualified voters of any of the officers named in the act. *Held*, that the word "may" is here used, not in the sense of "shall," but in its ordinary and proper signification, and left it to the discretion of the council whether the office of City Attorney should be elective or not. *Ball v. Fagg*, 481.

MACADAMIZED ROAD.

SEE CONDEMNATION OF LAND.

MALICE.

See Bank, 1.

MANDAMUS.

1. School tax: mandamus to county clerk. Mandamus will lie to compel a county clerk to extend a school tax upon the tax-books according to the estimate furnished him by the district directors; and this notwithstanding the extension has been prohibited by an order of the county court. That tribunal has no control over the county clerk in respect to the assessment and extension of school taxes. *The State ex rel. School District v. Byers*, 706.

2. ——: mandamus to county court. Mandamus will not lie to compel a county court to rescind an order by which it has undertaken to prohibit the county clerk from assessing and extending a school tax. *Ib.*

See Insurance, 2.

MARRIAGE.

See Joining Minor in Marriage.

MASTER AND SERVANT.

See Negligence, 2.

MAYHEM.

See Assault to Kill, 5.

MAYOR.

See Municipal Corporation.

MECHANIC'S LIEN.

1. On a railroad. Prior to the act of March 21st, 1873, (Acts 1873, p. 58,) a strip of land granted to a railroad company for a right of way could not be subjected to a mechanic's lien. It was not the design of the mechanic's lien law (2 Wag. Stat., p. 907), to allow a railroad to be sold out in detached parcels. *Schulenburg v. Memphis, Carthage & Northwestern R. R. Co.*, 442.

2. Right of partner to enforce a mechanic's lien: assignment:

RECITALS IN THE LIEN PAPER. Any member of a firm has the right to use the name of the firm in perfecting a mechanic's lien to which the firm is entitled; and the validity of the lien is not impaired by the fact that, before the filing of the account for that purpose in the firm name, one of the members of the firm has become sole owner of the claim, and the account contains a recital of that fact and declares that he alone is entitled to the benefit of the lien. *Jones v. Hurst*, 568.

3. A MECHANIC'S LIEN PASSES TO A PURCHASER OF THE DEBT. A purchaser of a note given in settlement of a balance due on a building contract and maturing within the time allowed by law for suing to enforce a mechanic's lien, is entitled to a lien against the building for the amount of the debt evidenced by the note, and may enforce it in his own name without any assignment of the account filed by the contractor to establish the lien. *Ib.*

MILITARY BOUNTY LANDS.

SEE RECORD OF DEED, 1.

MISTAKE.

MISTAKE IN COURT RECORDS, HOW CORRECTED: PAROL EVIDENCE is not admissible in a collateral proceeding for the purpose of showing that a court was in session on a day when the record of the court shows that it stood adjourned. A mistake in the record as to the date of the sitting must, like other mistakes in the record, be corrected by a direct proceeding for that purpose. *Mobley v. Nave*, 546.

SEE EQUITY, 4.

MORTGAGE.

SEE DEED OF TRUST.

MUNICIPAL BONDS.

SEE COUNTY BONDS.

LEXINGTON & ST. LOUIS RAILROAD BONDS.

TOWNSHIP BONDS.

MUNICIPAL CORPORATION.

1. CITY ORDINANCE, WHEN NOT A LAW WITHOUT THE MAYOR'S SIGNATURE. When the charter of a city provides that "every ordinance, before it shall become a law, must be * * * presented to the mayor for his approval; if he approves the bill, he shall sign it; if

not, he shall return it with his objections to the city council, * * * but, if any bill shall not be returned by the mayor within ten days * * after it shall have been presented to him for his approbation, the same shall become a law in the same manner as if he had approved and signed it;" *Held*, that when, after such presentation of a bill to the mayor, the council adjourns, *sine die*, before the ten days expire, and before the mayor signs the bill, it does not become a law; that, otherwise, it would be in the power of the council by such adjournment to nullify the charter and dispense with the concurrence of the mayor. *The State ex rel. Ganzhorn v. Carr*, 38.

2. CITY ORDINANCE: THE CITY CLERK'S ATTESTATION of the date of the Mayor's approval of a city ordinance cannot be contradicted by parol evidence. *Ball v. Fagg*, 481.

SEE COUNTY BONDS.

LEXINGTON & ST. LOUIS RAILROAD BONDS.

STREET OPENING.

TOWNSHIP BONDS.

MURDER.

1. DELIBERATION is an essential element of the crime of murder in the first degree. *The State v. Melton*, 594.

2. ACCOMPLICE: AIDING AND ABETTING MURDER. An instruction that if defendant was present aiding, abetting and assisting another in resisting arrest by an officer of the law, or in the killing of the officer which ensued, or was present ready to render such assistance as might be necessary, he was guilty of murder in the first degree, is not objectionable as holding defendant responsible for the act of the other without proof of any prior or present agreement or combination between them; especially when taken in connection with another instruction to the effect that the jury should acquit unless defendant was willfully, deliberately, premeditatedly, on purpose and of his malice aforethought present at the killing, and aiding, abetting, comforting and assisting in it. *The State v. Miller*, 604.

3. A VERDICT against the defendant on an indictment consisting of several counts, all of which charge the crime of murder in the first degree, is good without specifying the count on which the jury find him guilty. *Ib.*

SEE PRACTICE, CRIMINAL, 5.

NEGLIGENCE.

1. PERSONAL INJURY TO BRAKEMAN COUPLING CARS OF UNEQUAL HEIGHT. An experienced brakeman undertook to couple together two cars of unequal height without using the ordinary crooked link adapted

for preventing accidents in such cases. He knew of the inequality in height, and had the entire charge of the train. Owing to miscalculation on his part, and without any defect in the construction of either car, they came together, and he was crushed between them; *Held*, that he was not entitled to recover for the injuries so sustained. *Hulett v. St. Louis, Kansas City & Northern R. R. Co.*, 239.

2. EMPLOYER AND EMPLOYEE: DAMAGE ACT CONSTRUED: EVIDENCE. An action by the legal representatives of a deceased person, under the third section of the damage act, (Wag. Stat., p. 520,) can only be maintained where the deceased, had he survived, could have recovered damages for the injury; and the same evidence as to the cause of the injury is required in the one case as in the other; proof of the fact that the employee was injured or killed in consequence of the use of defective machinery will not, of itself, make out a case against the employer. It must also be shown that the employer was aware of the defect, or that, by the use of reasonable care on his part, it would have been discovered. *Elliott v. St. Louis & Iron Mountain R. R. Co.*, 272.

3. PARENT AND MINOR CHILD; PERSONAL INJURIES: NEGLIGENCE: DAMAGES. If a child of tender years, in the presence of its father and by his direction, undertakes to cross a railroad track and is injured in the attempt, any negligence of which the father may be guilty in giving the directions is imputable to the child in an action against the railroad company to recover damages for the injury. *Stillson v. Hannibal & St. Joseph R. R. Co.*, 671.

4. RAILROAD: OBSTRUCTION OF STREET BY TRAINS: FAILURE TO WHISTLE OR RING: NEGLIGENCE. The plaintiff, approaching a railroad track, found the street on which she was walking entirely obstructed by a train of cars standing across it. Several feet from the line of the street there was an opening, a few inches wide, between the rear car of this train and the rear car of another train which stood on the same track. Plaintiff undertook to pass through this opening, and, owing to a backward movement of one of the trains at that moment, was injured in the attempt. It was not shown whether this movement was the result of an impulse imparted by the locomotive, or was a gradual sliding back of the train down an incline, which existed at that part of the track, and it did not appear that any whistle was sounded or bell rung, nor that those in charge of the train knew that plaintiff was proposing or attempting to cross. In an action against the railroad company to recover damages for the injuries sustained, *Held*, 1st, The fact that the street was obstructed did not justify plaintiff's attempt. 2nd, Defendant was not in fault if it failed to ring the bell and blow the whistle. This is only required when a train is approaching a crossing. 3rd, There was no evidence of negligence, on the part of the company, to submit to the jury. The negligence was on the plaintiff's side. *Ib.*

SEE PRACTICE, 1.

RAILROAD, 2.

NEGOTIABLE PAPER.

SEE DEED OF TRUST, 1.

NEW PARTIES.

See Limitations, 2.

NEW TRIAL.

New trial: depositions in criminal cases. The fact that a witness for the defense, who resides beyond the limits of the State, is absent from the trial, is no ground for a new trial in a criminal case, when no effort has been made to obtain his deposition; neither are acts of intimidation practiced upon witnesses after they have given their testimony, nor newly discovered evidence which is merely cumulative or calculated to impeach or discredit a witness who has sworn at the trial. *The State v. Butler*, 59.

See Practice, Criminal, 1.

NOTARY PUBLIC.

See Promissory Note, 4.

NOTICE.

Recorded deed: notice. A conveyance of military bounty land which, without being either acknowledged or proven, was recorded in the county where the land lay prior to the passage of the act of February 2d, 1847, entitled "An act to quiet vexatious land litigation," (Sess. Acts, p. 94) is within the operation of section 8 of that act, (re-enacted as sec. 35, chap. 143, Gen. Stats. 1865,) and from and after that date imparted notice to all persons of its contents. (*Crispen v. Hannavan*, 50 *Mo.* 416, *limited and explained.*) *Ferguson v. Bartholomew*, 212.

See Appeal, 4.

Deed of Trust, 1, 5.

Partition, 1, 4.

Promissory Note, 4.

Street Opening, 1.

OFFICER.

1. Public officers: judicial notice will be taken of the powers and authority of public officers when they are prescribed by law. They need not be pleaded. *The State ex rel. Clark v. Gates*, 139.

2. Implied powers of public officers. Where an agent is clothed with general powers, the means and measures necessary to carry

them into effect are also granted; and this principle is applicable to public as well as private agents. *Ib.*

3. LIABILITY OF SCHOOL TREASURER FOR FUNDS LOST THROUGH FAILURE OF A BANK. A treasurer of a school township is liable on his official bond for school funds deposited in bank, and lost through the failure and insolvency of the bank, although he was not guilty of any want of care or prudence in failing to ascertain its financial condition. *The State ex rel. The Township v. Powell*, 395.

SEE PROMISSORY NOTE, 3.

PUBLIC ADMINISTRATOR.

PARENT AND CHILD.

1. A DEED OF GIFT FROM A PARENT TO HIS CHILD will not be set aside on the ground that it makes an unequal distribution of property among his children, when the parent had capacity enough to understand the value of the gift, and the condition and situation of those who had claims upon his bounty. *Moore v. Moore*, 192.

2. DRAMSHOP KEEPER: PARENT AND CHILD: PLEADING. In an action by a parent against a dramshop keeper for selling intoxicating liquors to his minor child without the consent of such parent, under the statute (1 Wag. Stat., p. 552, sec. 20), it is not necessary to allege in the petition the peculiar kind of liquor so sold. *Edwards v. Brown*, 377.

3. ——: ——: BOND FOR COSTS. Such an action is neither a *qui tam* action, nor an action on a penal statute where the penalty is given to the informer, and, therefore, does not come within the provisions of the statute (1 Wag. Stat., p. 341, § 1), requiring a bond for costs to be filed before, or at the time of, the filing of the information in such cases. It is merely a suit for damages provided by the Legislature as a compensation to the aggrieved parent. *Ib.*

4. PARENT AND MINOR CHILD: PERSONAL INJURIES: NEGLIGENCE: DAMAGES. If a child of tender years, in the presence of its father and by his direction, undertakes to cross a railroad track and is injured in the attempt, any negligence of which the father may be guilty in giving the directions, is imputable to the child in an action against the railroad company to recover damages for the injury. *Stillson v. Hannibal & St. Joseph R. R. Co.*, 671.

SEE ASSAULT, 2.

JOINING MINOR IN MARRIAGE.

PAROL EVIDENCE.

SEE COURT RECORDS, 1.

DEED OF TRUST, 5.

MUNICIPAL CORPORATION, 2.

PROMISSORY NOTE, 1, 6.

SHERIFF'S DEED, 1.

PARTIES.

SEE LIMITATIONS, 2.

PRACTICE IN SUPREME COURT. 1.

PROHIBITION, 1.

PARTITION.

1. DECREE IN PARTITION NOT COLLATERALLY ASSAILABLE BY ONE DEFENDANT FOR WANT OF NOTICE TO ANOTHER. Certain minor defendants in a partition suit were not served with notice of the suit, but afterwards accepted their distributive shares of the proceeds of a sale made under the decree. In ejectment for the land so sold, brought by other persons, who were also defendants in the partition; *Held*, that as the minors had accepted their shares and were not complaining, the plaintiffs could not avail themselves of the defect to assail the validity of the decree. *Brawley v. Ranney*, 280.

2. SERVICE BY PUBLICATION: RECITALS OF RECORD: PRACTICE. Recitals in a decree in partition, showing due publication of notice according to law, to non-resident defendants, cannot be assailed by them collaterally; and the proof of the notice being sufficient in other respects, the mere fact that the order of publication made by the clerk in vacation was not spread upon the records, but was filed as a paper in the cause, cannot invalidate the decree when attacked collaterally. *Ib.*

PARTNERSHIP.

1. FARMING ON SHARES. The occupancy and cultivation by one of the farm of another, under an agreement that the crops raised shall be divided between them in a certain proportion, does not constitute them copartners. *Donnell v. Harshe*, 170.

2. PARTNERSHIP REAL ESTATE. A title bond for real estate was made to a firm, who bought it for partnership purposes. After the death of one of the partners, the surviving partner, who administered upon the partnership estate, paid for the land out of the partnership assets, and the deed was made to him and the heirs of the deceased partner. The personal assets of the firm proving insufficient to pay its debts, the land was sold by order of the probate court for this purpose. In a suit brought to perfect title in the purchaser, *Held*, that he was entitled to a decree divesting the heirs of the deceased

partner of the title acquired by them under the deed, and vesting it in him. *Matthews v. Hunter*, 293.

3. PARTNERSHIP REAL ESTATE: PRESUMPTION FROM LAPSE OF TIME. The patent for certain land was issued to S & R, who composed a firm. S executed a power of attorney to V to sell and convey any property belonging to the firm. Within three months thereafter, V as attorney for S and R personally executed a conveyance of the land as partnership property. Forty-five years elapsed without complaint on the part of S or any one representing him. In an action of ejectment against a third party, by one claiming under this conveyance, it was *Held*, that the acquiescence of S in the treatment of the land as partnership property, would be presumed. *Wilkerson v. Allen*, 502.

4. RIGHT OF PARTNER TO ENFORCE A MECHANIC'S LIEN: ASSIGNMENT: RECITALS IN THE LIEN PAPER. Any member of a firm has the right to use the name of the firm in perfecting a mechanic's lien to which the firm is entitled; and the validity of the lien is not impaired by the fact that before the filing of the account for that purpose in the firm name one of the members of the firm has become sole owner of the claim, and the account contains a recital of that fact and declares that he alone is entitled to the benefit of the lien. *Jones v. Hurst*, 568.

5. PRACTICE: PLEADING: PARTNERS. The common-law rule which prohibited recovery against any one of several defendants sued as joint contractors, unless the proof showed a joint contract, has been abrogated by section 32, p. 1019, Wag. Stat. Under that section a plaintiff suing several as partners for breach of contract, may recover against such as he can prove to be parties to the contract without proof of the partnership. *Crews v. Lackland*, 619.

6. PROMISSORY NOTE: SET-OFF: PARTNERSHIP: EQUITABLE RELIEF. An answer to a suit upon a promissory note, against the maker and indorser, averred that the note grew out of certain partnership transactions between plaintiff and one of the defendants, which had proved unsuccessful, that it was indorsed by the other defendant with the understanding that it was to be paid only in the event the partnership turned out prosperously; that the accounts of the concern were still unsettled, and the maker of the note had paid more than his share of the losses. There was a prayer that the excess of his payments might be allowed as a set-off against the note, and for judgment for the balance. It was not averred that plaintiff was insolvent, and no other ground for equitable relief was stated; neither was an account of the partnership affairs stated or prayed for. *Held*, that the answer did not state a good defense for either defendant. *Jones v. Shaw*, 667.

SEE PRINCIPAL AND SURETY, 1.

PROMISSORY NOTE, 2.

PAYMENT.

SEE PROMISSORY NOTE, 2.

PERSONAL INJURIES.

PERSONAL INJURY TO BRAKEMAN COUPLING CARS OF UNEQUAL HEIGHT. An experienced brakeman undertook to couple together two cars of unequal height without using the ordinary crooked link adapted for preventing accidents in such cases. He knew of the inequality in height, and had the entire charge of the train. Owing to miscalculation on his part, and without any defect in the construction of either car, they came together, and he was crushed between them; *Held*, that he was not entitled to recover for the injuries so sustained. *Hulett v. St. Louis, Kansas City & Northern R. R. Co.*, 239.

SEE PARENT AND CHILD, 4.

PERSONAL PROPERTY.

A HOUSE, WHEN PERSONAL PROPERTY. A house erected under an agreement with the owner of the land that the builder shall have the right to remove it, is personal property as between the builder, or any one claiming under him, and the owner of the land, or any one purchasing from him with knowledge of the agreement. *Priestly v. Johnson*, 632.

PIGEON-HOLE TABLE.

AN INDICTMENT for keeping, &c., a pigeon-hole table without license is sufficient if it charges the offense in the language of the statute which creates it. Wag. Stat., p. 213, § 7. *The State v. Stogsdale*, 630.

PLAT.

SEE COUNTY PLAT.

PLEADING.

1. MISJOINDER OF CAUSES OF ACTION: DEED OF TRUST: DAMAGES. In an action by the grantors in a deed of trust against the trustee and the holder of the notes secured by the deed, for refusing to release the lands covered by the deed after the payment of the notes, the petition stated that the plaintiffs were thereby prevented from selling the lands at remunerative prices, and in the meantime they had greatly depreciated in value, to plaintiffs' damage $1,000; that, owing to the existence of this apparent incumbrance, plaintiffs were unable to meet their pecuniary liabilities, so that judgments were obtained against them, and the lands were sold under executions at a sacrifice, to plaintiffs' damage $500; and further, that by virtue of the statute defendants had become liable to pay plaintiffs ten per cent. on the amount of the notes. There was but one prayer for judgment, and that was for the aggregate sum of the damages and the penalty. On demurrer to this petition for misjoinder of causes of action, *Held*, that the claims for damages constituted one cause of action, and the claim for the penalty an-

other, and they should have been set out in separate counts. *Scott v. Robards*, 289.

2. PLEADING. All the facts which constitute a cause of action must be stated. It is not sufficient that some facts are stated from which others may reasonably be inferred which would make out a cause of action. *Ib.*

3. SPECIAL TAX-BILL. When the charter and ordinances of a city confer upon certain officers the power of awarding contracts for public works, an allegation, in a petition on a special tax-bill, that the contract for street improvement, under which it was issued was "duly awarded" by these officers is sufficient. Section 42, p. 1020, Wag. Stat., dispenses with the necessity of stating the facts which authorized them to make the award. *Culligan v. Studebaker*, 372.

4. A motion to strike out parts of a pleading should indicate the parts to which objection is made in such a manner that they may be ascertained. If this is not done, the Supreme Court cannot examine the ruling of the trial court upon the motion. *Jackson v. Bowles*, 609.

SEE ACCOUNT STATED, 1.

DRAMSHOP KEEPER, 1.

JUSTICE'S COURT, 3.

LACHES, 2.

PARTNERSHIP, 5.

RAILROAD, 3.

STATUTE OF FRAUDS, 3.

PLEADING, CRIMINAL.

SEE ASSAULT TO KILL, 1, 2, 3, 4.

BILLIARD TABLE, 2.

FORGERY, 1.

PIGEON-HOLE TABLE.

RAPE, 1.

POSSESSION.

SEE ADVERSE POSSESSION.

CONSTRUCTIVE POSSESSION.

POSTAGE.

See Promissory Note, 4.

POSTMASTER.

See Promissory Note, 3.

PRACTICE.

1. Discretion of trial court: relieving party against negligence of his attorney. At the return term of this case defendant appeared in the trial court by his attorney, and obtained leave to answer within sixty days, during vacation. He instructed his attorney in all the details of his defense, but the latter left the State without filing the answer, and did not return. Discovering that no answer was filed, defendant employed another attorney, who, at the beginning of the next term and before any default had been taken, presented an answer embodying an apparently meritorious defense, and with it an affidavit setting forth the foregoing facts, and asked leave of the court to file the answer. This was refused, and the case was continued till the following term, when judgment was rendered against the defendant; *Held*, that although this court is reluctant to interfere with the discretion of trial courts in relieving or refusing to relieve parties against the negligence of their attorneys, yet, as the circumstances of this case indicated no want of good faith on the part of the defendant, and no inconvenience to the plaintiff was likely to arise from it, the leave should have been granted, and the refusal was error requiring the reversal of the judgment. *Judah v. Hogan*, 252.

2. Jurisdiction: misjoinder of parties. Where two persons who are not jointly liable are joined as defendants in one action, if one of them resides and is served with process in a county other than that where the action is brought, the court acquires no jurisdiction over him; and if the misjoinder appears from the face of the petition, the question of jurisdiction may be raised after judgment. A plea to the jurisdiction before judgment is not necessary. *Graham v. Ringo*, 324.

3. Practice: principal and surety. It is no abuse of the discretion of the trial court to permit the plaintiff to dismiss his suit as to the principal in a bond, while continuing to prosecute it against the sureties. *Dorriss v. Carter*, 544.

4. After judgment against several defendants it was discovered that one of them was a married woman, and, as to her, the judgment was erroneous. Pending a motion for a new trial, and at the same term at which the judgment was rendered, on plaintiff's motion it was set aside, the suit was dismissed as to the married woman, and judgment was entered anew upon the verdict against the remaining defendants. *Held*, no error. *Jackson v. Bowles*, 609.

See Condemnation of Land, 2.

CONSTABLE, 1.

INFANCY, 2, 3.

INSTRUCTIONS, 1.

PARTITION, 2.

PARTNERSHIP, 5.

PRACTICE, CRIMINAL.

1. DEFECTIVE RECORD: CERTIORARI: NEW TRIAL. When the record originally sent to the Supreme Court is defective and it appears by a return to a writ of *certiorari* awarded for the purpose of supplying the defects, that the original papers in the case have been stolen, so that they cannot be supplied, a new trial will be ordered. The accused is entitled to have his case reviewed on a correct record. *The State v. Reed*, 36.

2. AMENDMENT OF VERDICT. It is not error for the trial court, at the suggestion of the prosecuting attorney, to allow the jury, before they are discharged, in open court and in the presence of defendant and his counsel, to make a formal correction in their verdict, so as to make it conform exactly to what they have found. *The State v. Chumley*, 41.

3. A WRIT OF ERROR does not lie on behalf of the State in a criminal case, (*following State v. Copeland*, 65 *Mo.* 497). *The State v. Cox*, 46.

4. HARMLESS ERROR. Where the lowest penalty, under the law, has been imposed upon a defendant in a criminal case, the rejection of evidence offered by him for the purpose of mitigating his punishment only, is not a reversible error. *The State v. Griffith*, 287.

5. MURDER: DEFENDANT'S RIGHT TO LIST OF JURORS. A party charged with murder in the first degree is not, under the statute, (Wag. Stat., secs. 7, 8, p. 1102,) entitled to be furnished, forty-eight hours before his trial, with a list of forty jurors who have been found by the court to be qualified to sit as such in his case, but only with a list of the panel summoned by the sheriff. *The State v. Melton*, 594.

6. PRACTICE, CRIMINAL: INDICTMENT IN SEVERAL COUNTS: ELECTION. When one count of an indictment charges that defendant jointly with another shot and killed a third person, and other counts charge him with being present aiding and abetting the other in the killing, the State will not be compelled to elect on which count she will go to trial. *The State v. Miller*, 604.

7. PRACTICE, CRIMINAL: CONTINUANCE: CONTRADICTION OF ABSENT WITNESS. The act of February 17th, 1875, (Acts 1875, p. 104,) applies to criminal cases, and permits the State to show that an absent witness has made a statement conflicting with one which has been read to the jury by the defense, under an agreement with the prosecuting attorney, made, as permitted by the act, to avoid a continu-

ance, that it should be received and read as the testimony which the witness, if present, would give. *Ib.*

See New Trial, 1.

PRACTICE IN SUPREME COURT.

1. Defect of parties: amendment: remittitur. Plaintiffs, as heirs of one who died seized of certain land, recovered in an action of ejectment a larger interest in such land than they were entitled to. Upon appeal, they asked leave of this court to add, as parties plaintiff, the names of other heirs representing the excess of interest recovered; *Held*, that this amendment could not be allowed; that the remedy in such case, where there is no other error in the record, is for plaintiffs to enter a *remittitur*. *McQuiddy v. Ware*, 74.

2. A judgment will not be reversed because of the exclusion of competent evidence, when it could not and should not, if admitted, have produced a different result. *Wilkerson v. Allen*, 502.

3. Where a judgment is reversed and the cause is remanded, with special directions to the trial court as to its further proceedings, and such court proceeds in conformity with the directions, its judgment will be affirmed on a second appeal. *Shroyer v. Nickell*, 589.

See Amendment, 2.

Will, 4.

PRESENTMENT FOR PAYMENT.

See Bank Check, 1, 2.

Promissory Note, 3, 4.

PRESUMPTIONS.

Place of recording deed: presumption. A deed to land within the limits of the present county of Jefferson was recorded in 1808 in St. Louis district. In the absence of evidence as to the boundaries of the districts as they existed at that time, *it was held* that the court would presume that the deed was properly recorded in that district. *Smith v. Madison*, 694.

See Assault to Kill, 8.

PRETERMITTED HEIRS.

1. Pretermitted heirs may maintain ejectment for their inheritance. *McCracken v. McCracken*, 590.

2. EJECTMENT: GENERAL ISSUE: EVIDENCE OF ADVANCEMENTS. Where plaintiffs in ejectment claim as pretermitted heirs, defendant will not be allowed to show under the general issue that they have received advancements and that he has made improvements on the land. To be available for any purpose, these facts must be pleaded. *Ib.*

3. ADVERSE POSSESSION: PRETERMITTED HEIRS Where defendant in ejectment claims under a will by the terms of which the land was to become his absolute property upon the death of his mother, no possession which he may have held under the testator or afterwards during the life of his mother can be considered as adverse to pretermitted heirs of the testator. *Ib.*

PRINCIPAL AND AGENT.

1. RAILROAD SUPERINTENDENT'S POWERS. No recovery can be had against a railroad company for drugs furnished to a person who has been hurt by the company's locomotive, on the order of a division superintendent of the road, without proof that he was authorized to give the order. The courts cannot take judicial notice of the duties of such an officer. *Brown v. Missouri, Kansas & Texas Ry. Co.*, 122.

2. IMPLIED POWERS OF PUBLIC OFFICERS. Where an agent is clothed with general powers, the means and measures necessary to carry them into effect are also granted; and this principle is applicable to public as well as private agents. *The State ex rel. Clark v. Gates*, 139.

3. PAYMENT TO AGENT AFTER NOTICE OF REVOCATION OF HIS AUTHORITY. Payment of the amount of a promissory note to a former agent of the holder, is no defense to a suit upon the note, if it was made after the payor had received notice that the note had been placed by the holder in the hands of another for collection. *Upton v. Jameson*, 234.

SEE WITNESS, 5.

PRINCIPAL AND SURETY.

1. PAYMENT BY SURETY. A surety on a note given after the dissolution of a firm, by one of the members of the firm in renewal of a note of the firm, on which also he was surety, may recover of the other member of the firm money which he has paid in discharge of the renewal note. *Leabo v. Goode*, 126.

2. TRUSTEE: CESTUI QUE TRUST: TRUSTEES' SURETIES. Although a trustee has no right to settle a debt due to him as trustee by merely canceling one due from himself in his individual capacity to the debtor, yet if the *cestui que trust* adopts the settlement and compels the sureties of the trustee to make good the amount to him, they cannot afterward recover it of the original debtor. *Sweet v. Jeffries*, 420.

3. CASE ADJUDGED. A sheriff sold land under a decree for partition and received a note for the purchase money. Becoming indebted to the purchaser, he agreed that his debt should be set off against the note, and accordingly executed a deed for the land without collecting the note. The parties entitled to the proceeds of the partition sale sued him and his sureties, alleging that the note had been paid. There was a recovery in this action and the sureties paid the judgment. In an action by them against the maker of the note; *Held*, that the settlement made by the sheriff, though originally unauthorized, had been adopted by the parties in interest and had thereby become binding upon the sureties. *Ib.*

4. CREDITOR'S RIGHT OF SUBROGATION: SURETY'S RIGHT TO RELEASE SECURITIES. A creditor who applies to be subrogated to the rights of sureties in securities held by them, must be content to take them as he finds them when he makes his application. If they were given by the debtor merely to indemnify the sureties, and without any view of securing the creditor, and they have in good faith released, discharged or otherwise impaired their value, before he has taken any steps to subject them to his claim, he cannot justly complain. *Logan v. Mitchell*, 524.

5. MEASURE OF SURETIES' LIABILITY ON INJUNCTION BOND: ACTION. The obligation of the sureties in a statutory injunction bond is not to pay all damages that the injunction may occasion to the defendant, but to pay such as the court shall, upon the dissolution of the injunction, adjudge against the plaintiff; and until they have been adjudged no action can be maintained on the bond. *Dorriss v. Carter*, 544.

6. PRACTICE: PRINCIPAL AND SURETY. It is no abuse of the discretion of the trial court to permit the plaintiff to dismiss his suit as to the principal in a bond, while continuing to prosecute it against the sureties. *Sauer v. Griffin*, 654.

7. APPEAL BOND: SURETY: ADMINISTRATION. Until an appeal has been determined, the liability of a surety on the appeal bond is purely contingent, and, in case of his death, does not constitute a claim which the obligee may prove against his estate in the probate court. *Ib.*

SEE COUNTY TREASURER, 3.

PUBLIC ADMINISTRATOR.

PROCESS.

SEE PARTITION, 2.

STREET OPENING, 1.

PROHIBITION.

A WRIT OF PROHIBITION DOES NOT LIE to arrest a proceeding at law for

defect of parties, as when a suit which should be brought in the name of the State is brought in the name of private persons. *Bowman's Case*, 146.

PROMISSORY NOTE.

1. INDORSER'S LIABILITY: EVIDENCE will not be received for the purpose of showing that a payee of a promissory note who has transferred it by an indorsement in blank, verbally agreed at the time of making the indorsement to assume an absolute and unconditional liability, and not the liability simply of an endorser. *Rodney v. Wilson*, 123.

2. RENEWAL NOTES: PAYMENT. The acceptance by a creditor of the note of an individual member of a firm after dissolution of the firm, in lieu of a matured note of the firm, is not an extinguishment of the firm debt, unless it is expressly agreed that it shall so operate. *Leabo v. Goode*, 126.

3. DEMAND OF PAYMENT: DILIGENCE: HOLDER NOT PREJUDICED BY MISTAKE OF POSTMASTER. The holder of a note, payable in a distant city, sent it by mail for collection to a bank in that city, in ample time to reach its destination by ordinary course of mail before maturity. When the letter, containing the note, reached the city, the bank had made an assignment, and, the address of the holder being printed on the envelope, the postmaster at once returned it with the endorsement, "bank failed." The holder, on the day of its reception, again mailed it to another agent in said city, who caused it to be presented and protested for non-payment on the day it was received, but several days after maturity; *Held*, that the holder had used due diligence in making demand of payment; that he was not required to make provision for a possible but unanticipated suspension of the bank before arrival of the letter, nor for the unauthorized interference with the same by the public officer in charge of the mails. *Pier v. Heinrichshoffen*, 163.

4. NOTICE OF NON PAYMENT: NOTARY'S CERTIFICATE: PREPAYMENT OF POSTAGE: MAILS: EVIDENCE. A notary's certificate of protest, which states that he put into the proper postoffice the notice of presentment, demand, refusal and protest, is sufficient without the further statement by him that he prepaid the postage on such notice. So, the word "mailed," as applied to a letter, implies that the letter was properly prepared for transmission, and was put in the custody of the officer charged with the duty of forwarding the mail. *Ib.*

5. NUDUM PACTUM: CONSIDERATION: DELIVERY. One who becomes party to a note after it has once been delivered and the consideration has passed between the original parties, incurs no liability unless there is some new consideration and a redelivery of the note. The fact that he signs in the presence of the holder does not, by itself, amount to redelivery. *Williams v. Williams*, 661.

6. PROMISSORY NOTE: PAROL EVIDENCE OF COTEMPORANEOUS AGREEMENT: PARTNERSHIP. Parol evidence is not admissible for the purpose of showing that a promissory note, absolute by its terms, was only intended as evidence of the amount of money which had been

advanced by plaintiff to aid in carrying on a partnership business, and which, it was agreed, was to be returned to plaintiff only in the event that thebusiness should turn out prosperously. See *Rolney v. Wilson*, 123, *Jones v. Shaw*, 667.

SEE EQUITY, 6.

ESCROW.

FORGERY, 1.

GUARANTY.

HOMESTEAD, 3.

HUSBAND AND WIFE, 5, 6.

MECHANIC'S LIEN, 3.

PUBLIC ADMINISTRATOR.

PUBLIC ADMINISTRATOR EXECUTING A WILL COLORE OFFICII: LIABILITY OF HIS SURETIES. A public administrator being named in a will as executor, without giving bond as such, and without giving the notice required by Wag. Stat., p. 123, sec. 8, assumed control of the estate devised and executed the powers conferred by the will. The probate court recognized his acts as those of the public administrator. In a suit by a distributee to recover a share of the estate; *Held*, that he was chargeable as public administrator and not as executor or private administrator with the will annexed, and his sureties were liable accordingly. *The State to use of Betts v. Purdy*, 89.

QUANTUM MERUIT.

SEE INSTRUCTION, 3.

QUI TAM ACTION.

SEE DRAMSHOP KEEPER, 2.

RAILROAD.

1. CONGRESSIONAL LAND GRANTS TO RAILROADS: SWAMP LANDS. Under the act of Congress of June 10th, 1852, entitled "An act granting the right of way to the State of Missouri, and a portion of the public lands to aid in the construction of certain railroads in said State," and the act of Congress entitled "An act to vest in the several States and Territories, the title in fee of the lands which have been or may be certified to them," approved Aug. 3d, 1854, a descriptive list of lands accruing to the State under the former act, containing the land in

controversy, made out and certified on the 9th of Feb., 1854, by the commissioner of the general land office, and approved by the Secretary of the Interior, and again certified in May, 1856, by said commissioner, in conformity with the latter act, confers upon the State a title to the land in controversy, unless it be swamp land or embraced in some other grant; such land was not vacant or unappropriated within the meaning of the act of March 3d, 1857, entitled "An act to confirm to the several states the swamp and overflowed lands selected under the act of Sept. 28th, 1850," &c. *Pacific Railroad v. Lindell's heirs*, 39 *Mo.* 329 *distinguished. Funkhouser v. Peck*, 19.

2. RAILROAD FENCES: DOUBLE DAMAGES. A railroad company is not liable in double damages under the 43rd section of the railroad law, (Wag. Stat., p. 310,) for cattle killed at the crossing of a private road, or at a point where the railroad runs through uninclosed timbered lands or through uninclosed lands from which the timber has been taken, although such lands are but a narrow strip on each side of the road, and the next adjoining lands to them on each side are inclosed fields. (*Robinson v. C. & A. R. R. Co.*, 57 *Mo*, 494, *distinguished and criticised.*) *Walton v. St. Louis, Iron Mountain & Southern Ry. Co.*, 56.

3. A PETITION UNDER THE 43RD SECTION OF THE RAILROAD LAW, as amended in 1875, (Sess. Acts, p. 131,) is fatally defective if it fails to allege that the injury for which double damages are asked, was occasioned by the failure of the company to erect and maintain a fence. *Luckie v. Chicago & Alton R. R. Co.*, 245.

4. ———. If the owner of cattle injured on a railroad track, sues for double damages under the 43rd section, he must recover, if at all, under that section. He cannot recover under the 5th section of the damage act, or on a cause of action at common law. *Ib.*

5. MECHANIC'S LIEN. Prior to the act of March 21st, 1873, (Acts 1873, p. 58,) a strip of land granted to a railroad company for a right of way could not be subjected to a mechanic's lien. It was not the design of the mechanic's lien law (2 Wag. Stat., p. 907), to allow a railroad to be sold out in detached parcels. *Schulenburg v. Memphis, Carthage & Northwestern R. R. Co.*, 442.

6. OBSTRUCTION OF STREET BY TRAINS: FAILURE TO WHISTLE OR RING: NEGLIGENCE. The plaintiff, approaching a railroad track, found the street on which she was walking entirely obstructed by a train of cars standing across it. Several feet from the line of the street there was an opening, a few inches wide, between the rear car of this train and the rear car of another train which stood on the same track. Plaintiff undertook to pass through this opening, and, owing to a backward movement of one of the trains at that moment, was injured in the attempt. It was not shown whether this movement was the result of an impulse imparted by the locomotive, or was a gradual sliding back of the train down an incline, which existed at that part of the track, and it did not appear that any whistle was sounded or bell rung, nor that those in charge of the train knew that plaintiff was proposing or attempting to cross. In an action against the railroad company to recover damages for the injuries sustained, *Held*, 1st, The fact that the street was obstructed did not justify plaintiff's attempt. 2nd, Defendant was not in fault if it failed to ring the bell and blow the whistle. This is

only required when a train is approaching a crossing. 3rd, There was no evidence of negligence, on the part of the company, to submit to the jury. The negligence was on the plaintiff's side. *Stillson v. Hannibal & St. Joseph R. R. Co.*, 671.

7. LOCOMOTIVE SCATTERING SPARKS: PROXIMATE AND REMOTE CAUSE: NEGLIGENCE. Sparks escaping from a railroad locomotive set fire to the prairie adjoining the company's right of way at a place where the grass was very rank and dry. The wind being high, the fire extended some three miles before night, and continued to burn during the night, though slowly, the wind having fallen. The following morning the wind rose again and blew with great violence, carrying the fire some five miles further, in the course of a few hours, to the plaintiff's farm, where it swept over a fire-line of sixteen feet of plowed ground, and destroyed plaintiff's property. Such violent winds were not unfrequent in that country. In an action of damages against the company, *Held*, that as the rise of the wind was a thing which a prudent man might reasonably have anticipated, it could not be regarded as the intervention of a new agency, so as to relieve the company from the consequences of its negligence in permitting the fire to escape; and as the fire was, in fact, one continuous conflagration, notwithstanding the lapse of time and the great distance over which it traveled before reaching plaintiff's property, a judgment in his favor was affirmed. *Poeppers v. Missouri, Kansas & Texas Railway Company*, 715; *Hightower v. Missouri, Kansas & Texas Railway Company*, 726.

SEE COUNTY BONDS.

NEGLIGENCE, 1, 2, 3.

PERSONAL INJURIES, 1.

PRINCIPAL AND AGENT, 1.

TOWNSHIP BONDS.

TRESPASS, 1.

RAPE.

INDICTMENT FOR ASSAULT TO COMMIT A RAPE. An indictment under section 32, 1 Wag. Stat., p. 449, which charges that defendant made a felonious assault upon a woman with intent to commit a rape in and upon her, and to carnally know her by force and against her will, is not defective because the precise words of the statute, "forcibly ravish," are not used. *The State v. Little*, 624.

REASONABLE TIME.

SEE COUNTERFEIT NOTES, 1, 2.

RECEIVER.

RECEIVER: WHEN HIS TITLE ACCRUES. The title of a receiver to the property which is the subject of the receivership, attaches from the date of the order of court appointing him; it is not deferred until he gives bond in compliance with the order. *Maynard v. Bond*, 315.

SEE SHERIFF.

RECITAL.

SEE PARTITION, 2.

TAX DEED.

RECORD OF DEED.

1. MILITARY BOUNTY LANDS: RECORDED DEED: NOTICE. A conveyance of military bounty land which, without being either acknowledged or proven, was recorded in the county where the land lay prior to the passage of the act of February 2d, 1847, entitled "An act to quiet vexatious land litigation," (Sess. Acts, p. 94,) is within the operation of section 8 of that act, (re-enacted as sec. 35, chap. 143, Gen. Stats 1865,) and from and after that date imparted notice to all persons of its contents. (*Crispen v. Hannavan*, 50 *Mo.* 416, *limited and explained.*) *Ferguson v. Bartholomew*, 212.

2. PLACE OF RECORDING DEED: PRESUMPTION. A deed to land within the limits of the present county of Jefferson was recorded in 1808 in St. Louis district. In the absence of evidence as to the boundaries of the district as they existed at the time, *it was held* that the court would presume that the deed was properly recorded in that district. *Smith v. Madison*, 694.

3. PROOF OF ANCIENT RECORDED DEEDS: STATUTES IN FORCE. Sections 35 and 36 of the chapter on evidence, (Wag. Stat., page 595,) permitting a certified copy of a deed recorded thirty years before the 1st day of January, 1867, to be read in evidence without proof of the execution of the original, whether it was properly acknowledged or not, have been repealed by the act of March 28th, 1874. (Acts 1874, page 59). *Ib.*

REGISTRATION OF VOTERS.

SEE TOWNSHIP BONDS, 2, 7.

REMITTITUR.

SEE PRACTICE IN SUPREME COURT, 1.

RETURN.

See Amendment, 1.

Street Opening, 1.

REVENUE, STATE AND COUNTY.

See Township Railroad Bonds, 9.

ROAD.

1. A private road is a public highway within the meaning of section 5 of the damage act. (Wag. Stat., p. 520.) *Walton v. St. Louis, Iron Mountain & Southern Ry. Co.*, 56.

2. Condemnation of right of way: prior contract for location of a road. The fact that a corporation, authorized to construct a macadamized road and to condemn land for that purpose, has contracted with the owner of a tract of land for the construction of its road across his land on an agreed line, and has partly constructed it on that line, is no bar to a proceeding by the corporation to condemn a right of way across the same land on a different line. The corporation may change the location of its road if it sees fit, subject to the right of the other party to recover such damages as he may sustain by reason of the breach of contract. *Cape Girardeau and Scott County Macadamized Road Company v. Dennis*, 438.

RULE IN SHELLEY'S CASE.

The rule in Shelley's case was in force in this State in 1836, and a conveyance then made, *habendum* to A during his natural life for his use and benefit, and, after his death, in fee simple to his heirs, vested in A an estate in fee. *Muldrow v. White*, 470.

SALE.

1. Delivery to carrier, constructive delivery to consignee: damage to goods in transit: acceptance and waiver. The rule that delivery to the usual carrier, with proper instructions, is to be considered delivery to a consignee who has ordered goods from a distance, without giving special directions as to shipment, is applicable to a case where the goods shipped are not all of the particular grade ordered, if they have been received by the consignee with knowledge of the fact and without objection. In such a case, in the absence of any warranty by the consignor, he is not liable for damage to the goods occurring while they are in the hands of the carrier. Acceptance of the goods, with knowledge that they are damaged, is to be taken as a waiver of all objections on that score. *Graff v. Foster*, 522.

2. WARRANTY OF QUALITY: SALE BY SAMPLE. In order to constitute a warranty of the quality of goods, it is not necessary that the word "warranty" shall be used. It is sufficient if the words used signify an undertaking, on the part of the seller, that the goods sold are what they are represented to be. So, if the seller exhibits samples as a fair specimen, and agrees to deliver goods equal in quality to the samples, and the purchaser buys, relying on this promise, there is a warranty. *Ib.*

SCHOOLS.

1. PUBLIC SCHOOLS: USE OF SCHOOL BUILDING FOR RELIGIOUS PURPOSES. The board of directors of a school district cannot authorize the school building put up and furnished under the school law, (2 Wag. Stat., p. 1262,) to be used for the purpose of teaching a Sunday school. *Dorion v. Hearn*, 301.

2. LIABILITY OF SCHOOL DISTRICT FOR SUPPLIES: POWER OF DIRECTORS TO CONTRACT: SCHOOL ORDERS: CLERK. No action can be maintained against a school district upon an order drawn on the township treasurer by one or more of the directors of the district, for the price of maps, globes, &c., purchased by them for the use of the district without authority of the board; nor can an action be maintained against a district upon an order not signed by the clerk of the district. *Johnson v. School District*, 319.

3. SCHOOL DISTRICT: RATIFICATION OF DIRECTORS' CONTRACT. The fact that articles purchased for the use of the school by one or more of the directors without the authority of the board, have been used in the school, does not amount to a ratification of the purchase, or impose upon the district any obligation to pay for them. *Ib.*

4. LIABILITY OF SCHOOL TREASURER FOR FUNDS LOST THROUGH FAILURE OF A BANK. A treasurer of a school township is liable on his official bond for school funds deposited in bank and lost through the failure and insolvency of the bank, although he was not guilty of any want of care or prudence in failing to ascertain its financial condition. *The State ex rel. The Township v. Powell*, 395.

5. SCHOOL DISTRICT. The school law of March 19th, 1870, (Acts 1870, p. 139,) did not have the effect of dividing into two school districts a Congressional township which lay partly in one county and partly in another. It only authorized the division to be made in case each fraction of the township could be attached to some other township in the county in which it lay, and no mode of making the attachment was provided until the act of March 26th, 1874. (Acts 1874, p. 152, sec. 23.) *The State ex rel. School District v. Byers*, 706.

6. SCHOOL TAX: MANDAMUS TO COUNTY CLERK. Mandamus will lie to compel a county clerk to extend a school tax upon the tax-books according to the estimate furnished him by the district directors; and this notwithstanding the extension has been prohibited by an order of the county court. That tribunal has no control over the county clerk in respect to the assessment and extension of school taxes. *Ib.*

7. ——: MANDAMUS TO COUNTY COURT. Mandamus will not lie to compel a county court to rescind an order by which it has undertaken to prohibit the county clerk from assessing and extending a school tax. *Ib.*

SCHOOL TREASURER.

SEE SCHOOLS, 4.

SERVICE BY PUBLICATION.

SEE PARTITION, 2.

SELF DEFENSE.

SEE CRIMINAL LAW, 1.

SET-OFF.

SEE HUSBAND AND WIFE, 1.

PARTNERSHIP, 6.

SHERIFF.

CORPORATION: STOCKHOLDER'S LIABILITY: POWERS OF SHERIFF ACTING AS RECEIVER. A sheriff, acting as receiver of the effects of a corporation by virtue of an appointment made by the court under Gen. Stat. 1865, secs. 20 and 21, p. 642, (Wag. Stat., p. 606,) has no power, by suit in his own name, to enforce the liability of a stockholder to the corporation for unpaid stock which is not due according to the terms of his subscription, and for which no call has been made by the directors. The subscription which creates his liability is not an evidence of indebtedness to the corporation within the meaning of these sections of the statute, and it is only evidences of indebtedness that they allow him to sue upon and collect. The power to enforce such liability cannot be conferred upon the sheriff by an order of court, or by an agreement among the judgment creditors of the corporation. *Hannah v. The Moberly Bank*, 678.

SEE TRUSTS AND TRUSTEES, 2.

SHERIFF'S DEED.

1. DESCRIPTION: PAROL EVIDENCE. A sheriff's deed will not be held void because the description is in part unintelligible, if the land, intended to be conveyed, can be identified by parol evidence, (*following McPike v. Allman*, 53 *Mo.* 551). *Adkins v. Moran*, 100.

2. SHERIFF'S DEED: HOW IT MAY BE AVOIDED FOR IRREGULARITY IN THE SALE. If a sheriff's sale be made on a day different from that on which it is advertised to be made, the defendant in the execution, or his creditor, if damaged thereby, may by a timely application have the sale set aside; but where the sheriff has made a deed, good upon its face, to the purchaser, who was a stranger to the execution, and there is no evidence in any way connecting him with the mistake made, or tending to show it to have been fraudulent, the deed cannot be collaterally assailed after the lapse of half a century for such irregularity. *Houck v. Cross*, 151.

SEE EQUITY, 4.

SIGNIFICATION OF TERMS.

"ASSENT," SEE TOWNSHIP BONDS, 3.

"DUE," VENDOR'S LIEN, 1.

"MAILED," PROMISSORY NOTE, 4.

"MAY." LOUISIANA CITY ATTORNEY.

"SUBMISSION." COSTS, 3.

"TITLE TO REAL ESTATE," SEE ST. LOUIS COURT OF APPEALS.

SPANISH LAND CLAIMS.

SEE LANDS AND LAND TITLES.

SPECIAL JUDGE.

SEE CRIMINAL COURTS, 1.

SPECIAL TAX BILL.

1. PLEADING. When the charter and ordinances of a city confer upon certain officers the power of awarding contracts for public works, an allegation, in a petition on a special tax-bill, that the contract for street improvements, under which it was issued was "duly awarded" by these officers is sufficient. Section 42, p. 1020, Wag. Stat., dispenses with the necessity of stating the facts which authorized them to make the award *Culligan v. Studebaker*, 372.

2. STREET IMPROVEMENTS: HOW PAID FOR: SPECIAL TAX BILLS. Under the existing charter of the city of St. Joseph, the city is not liable for the cost of paving, macadamizing or guttering any street, not-

withstanding neither the ordinance nor the contract under which the work is done specifies how it is to be paid for. The charter provides that the city engineer shall issue special tax bills against the adjoining property, and this is the contractor's only means of payment. If the engineer fails to issue the bills, he may be compelled to perform his duty or may be held liable for his delinquency. *Kiley v. City of St. Joseph*, 491.

ST. LOUIS COURT OF APPEALS.

APPEAL TO SUPREME COURT. A suit to enjoin a sale of real estate under execution, upon the ground that such sale would cast a cloud upon the title, is not a case involving the title to real estate within the meaning of that clause of section 12, article 6, of the constitution of 1875, which declares that appeals shall lie from the decisions of the St. Louis court of appeals to the Supreme Court in all such cases. *The State ex rel. Haeussler v. Court of Appeals*, 199.

STATE BOARD OF EQUALIZATION.

COMPENSATION OF ITS MEMBERS. Under the State constitution of 1875, officers of the Executive Department are not entitled to any compensation for services rendered by them as members of the State board of Equalization. *State ex rel. McGrath v. Holladay*, 64.

STATE TREASURER.

THE STATE TREASURER may pay a demand upon the treasury by a check upon a bank where he has money on deposit, that mode of payment being in accordance with immemorial commercial usage. *The State ex rel. Clark v. Gates*, 139.

SEE COUNTY TREASURER, 1, 2.

INSURANCE, 2.

STATUTES.

STATUTES in derogation of the common law are to be so construed as not to infringe upon the rules or principles of the common law to any greater extent than is plainly expressed. *The State v Clinton*, 380.

STATUTES CONSTRUED.

WAGNER'S STATUTES OF 1872.

Page 72, § 13, See Administration, 3.
Page 77, § 49, See Administration, 2.
Page 81, §§ 68, 69, See Administration, 2.
Page 213, § 7, See Pigeon-Hole Table.
Page 251, § 1, See Texas Cattle.
Page 281, § 10, See Fraudulent Conveyances.
Page 291, § 13, See Execution, 4.
Page 310, § 43, See Railroad, 2.
Page 313, § 51, See Township Bonds.
Page 341, § 1, See Dramshop Keeper, 2.
Page 349, § 4, See Costs, 1.
Page 449, § 29, See Assault to Kill, 1, 6.
Page 449, § 32, See Assault to Kill, 1, 6.
Page 449, § 32, See Rape.
Page 450, § 33, See Assault, 1.
Page 511, § 3, See Witness, 1.
Page 513, § 7, See Cumulative Sentences.
Page 520, § 3, See Damages, 1.
Page 520, § 5, See Roads.
Page 552, § 20, See Dramshop Keeper, 1.
Page 591, § 11, See County Plat, 1.
Page 595, §§ 35, 36, See Evidence, 11.
Page 606, §§ 20, 21, See Sheriff, 1.
Page 623, § 10, See Costs, 3.
Page 698, § 5, See Homestead, 3.
Page 783, § 3, See Constable, 2.
Page 844, § 19, See Constable, 1.
Page 844, § 22, See Constable, 2.
Page 1019, § 32, See Partnership, 5.
Page 1020, § 42, See Special Tax Bill, 1.
Page 1056, § 25, See Costs, 3
Page 1069, § 45, See Linn Co. Ct. Common Pleas.
Page 1091, § 28, See Forgery, 1.
Page 1102, §§ 7, 8, See Practice, Criminal, 5.
Page 1137, §§ 14, 15, See Court Records, 2.
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GENERAL STATUTES OF 1865.

Page 328, § 11, See Execution, 4.
Page 351, § 1, See Condemnation of Land, 3.
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ACTS OF 1877.

Page 217, See Criminal Courts, 1.
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ACTS OF 1875.

Page 60, See Homestead. 5.
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Page 320, See Street Opening, 3, 4.

ACTS OF 1874.

Page 59, See Evidence. 11.
Page 152, § 23, See School, 5.

ACTS OF 1873.

Page 58, See Mechanic's Lien, 1.

ACTS OF 1870.

Page 139, See School, 5.
Page 394, See Louisiana City Attorney.

ACTS OF 1868.

Page 46, See Lexington & St. Louis R. R. Bonds.
Page 90, See County Bonds, 4.
Page 92, See Township Bonds.

ACTS OF 1867.

Page 93, See Linn Co. Ct. Common Pleas.

ACTS OF 1860-61

Page 60, See County Bonds, 1

ACTS OF 1859-60.

Pages 399, 400, See Lexington & St. Louis R. R. Bonds.

ACTS OF 1851.

Page 481, See Constitutional Law, 2.

ACTS OF 1847.

Page 94, See Notice, 1.

ACTS OF 1845

Page 114, See Constitutional Law, 2.

STATUTE OF FRAUDS.

1. CONTRACT: EVIDENCE. A being a creditor of B and also debtor to C in an equal amount, it was verbally agreed by way of settlement among them, that B should pay C what he owed A. *Held*, that the agreement was not within the statute of frauds, and was binding.

   An order having been drawn by A upon B in favor of C, to carry out such an agreement, *Held*, admissible in evidence to show the exact amount B had assumed to pay. *Wright v. McCully*, 134.

2. INCOMPLETE MEMORANDUM OF CONTRACT: PAROL EVIDENCE. A request

in writing by defendants of plaintiff to get them a certain number of hogs, is a sufficient memorandum under the statute of frauds, of a contract to receive and pay for such hogs; and parol evidence is admissible to show the price agreed upon. *O'Neil v. Crain*, 250.

3. STATUTE OF FRAUDS: PLEADING. The statute of frauds is not available as a defense to an action for goods sold and delivered, either where the answer admits the delivery, or where it fails to plead the statute as a defense. *Graff v. Foster*, 512.

STREET OPENING.

1. ASSESSMENT OF BENEFITS: NOTICE: MARSHAL'S RETURN. The charter of the city of St. Louis (Acts 1870, p. 478, sec. 2), provided that notice of proceedings to open any street should be given to any person whose property was to be condemned, either by delivering the same to him, or by leaving a copy at his usual place of abode; also, that notice should be given to any person against whose property it was proposed to assess benefits, "such notice to be served or published for the same terms of time, for like causes and with like effect, respectively, as is provided for notices in cases of condemnation." In a proceeding under this act the city marshal returned that he had served notice on certain persons, against whose property it was proposed to assess benefits, "by having had personal service." On *certiorari* to set aside an assessment founded upon this notice, *Held*, 1st, That a person whose property was assessed with benefits was entitled to be served with notice in the same manner as one whose property was condemned; 2nd, That the marshal's return was insufficient, because it failed to state in what the personal service consisted; 3rd, That the proceeding being *in invitum*, statutory, summary and in derogation of private right, and notice being essential to confer jurisdiction, the assessment was void, because it did not appear affirmatively on the face of the record that the prescribed notice had been given. *The State ex rel. Greely v. City of St. Louis*, 113.

2. ASSESSMENT OF BENEFITS: THE TAXING POWER The assessment of benefits accruing from the opening of a street against the owners of property especially benefitted by the improvement and adjacent to it, but no part of which is taken for it, is a legitimate exercise of the taxing power, (*following Garrett v. St Louis*, 25 *Mo.* 505, and other cases). *City of St. Louis v. Speck*, 403.

3. DISTRICT TO BE ASSESSED. The act of 1875 amending the charter of the City of St. Louis (Acts 1875, p. 320), authorized the assessment of benefits to accrue from the opening of a street against any property lying within the limits which the appraisers should determine would be especially benefitted by the improvement. It did not limit them to the assessment of benefits against the city at large and the owners of lots, part of which were taken for the street. *Ib.*

4. ——: ——: EVIDENCE. Under section 4 of the foregoing act, a person against whom benefits were assessed, but whose land was not taken, had no right to show that the appraisers fixed an excessive valuation upon the land that was taken. He could only show that his property was not benefitted to the amount of the assessment. *Ib.*

SUBMISSION.

See Costs, 3.

SUBROGATION.

Creditor's right of subrogation: surety's right to release securities. A creditor who applies to be subrogated to the rights of sureties in securities held by them, must be content to take them as he finds them when he makes his application. If they were given by the debtor merely to indemnify the sureties, and without any view of securing the creditor, and they have in good faith released, discharged or otherwise impaired their value, before he has taken any steps to subject them to his claim, he cannot justly complain. *Logan v. Mitchell*, 524.

See Limitations, 2.

SUPERSEDEAS BOND.

See Linn County Court of Common Pleas.

SWAMP LANDS.

1. Selection of swamp lands: parol evidence to identify. Where title to land in controversy is deraigned under the act of Congress of Sept. 28th, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," parol testimony is admissible to show that such land was not swamp land within the meaning of the act, unless it has been included by the Secretary of the Interior in the lists and plats of swamp lands certified by him to the State, or had remained vacant and unappropriated until the confirmatory act of March 3d, 1857, and had, prior to that date, been selected and reported to the commissioner of the general land office, as swamp and overflowed lands; and the fact that the land was selected and reported by the county commissioner to the register of lands, and by the surveyor general to the commissioner of the general land office, who, after suit brought, granted his certificate that certain lists of swamp lands, including the land in controversy, were true and literal copies of the original swamp land selections on file in his office, is not evidence that the Secretary of the Interior had ever certified the land as swamp land to the State. (*Clarkson v. Buchanan* 53 *Mo.* 563, *distinguished.*) *Funkhouser v. Peck*, 19.

2. Ejectment: swamp lands: railroad lands. When the plaintiff's claim to the land in controversy, in an action of ejectment, is founded on the swamp land grant of Congress of September 28th, 1850, he cannot recover if it appears that the land is, in point of fact, high and dry, rolling prairie, and has never been selected as swamp land by the proper officers of the general government, notwithstanding the defendant, who claims under the railroad land grant of Congress of June 10th, 1852, fails to show that the railroad company either had built its road into the county where the land

lay, when it was selected by the company, or had recorded a map of the lands selected in the proper county as required by the act of the State Legislature of September 20th, 1852. *Ib.*

3. EVIDENCE OF SELECTION. Proof that a tract of land is swamp land within the meaning of the swamp land grant of Congress of September 28th, 1850, without evidence that it has ever been selected as such, is no bar to an action of ejectment for the land brought by one holding a patent from the United States. *Birch v. Gillis*, 102.

SEE RAILROADS, 1.

TAXES AND TAXATION.

1. AGAINST ILLEGAL TAXATION. Injunction is a proper remedy to prevent the collection of a tax levied in excess of the legal limit; but before the writ is granted, the court should require the complainant to pay so much of the tax as is confessedly due. *Overall v. Ruenzi*, 203.

2. TAXATION: CONSTITUTION OF 1875. A city tax was assessed prior to November 30th, 1875, the day when the new constitution took effect, but the assessment was not finally passed on by the board of appeals until April, 1876, and the bills were not received by the collector until July, 1876; *Held*, that it was subject to the restrictions of section 11, article 10 of the constitution, limiting the rate of taxation for city purposes, and requiring the valuation to be the same as for State and county purposes. *Ib.*

3. ILLEGAL TAXES: TAX-PAYER'S REMEDY. No action can be maintained against a collector by one who has been compelled to pay taxes levied to meet the interest on illegal bonds, for the recovery of the amount. The remedy of the tax-payer is a proceeding to arrest the collection of the tax, (*following Rubey v. Shain*, 54 *Mo.* 207). *Ranney v. Bader*, 476.

SEE EQUITY, 4.

SCHOOLS, 6, 7.

STREET OPENING, 2.

TAX DEED.

ESSENTIAL RECITAL. Section 217, page 1205, Wag. Stat., requires the date of the execution or order of the county court authorizing the sale of land for the non-payment of taxes to be recited in the deed executed in pursuance of the sale; the absence of this recital is fatal to its validity. *Williams v. McLanahan*, 499.

TEMPORARY JUDGE.

SEE CRIMINAL COURTS, 1.

TENANT IN COMMON.

See Adverse Possession, 2.

Undue Influence, 2.

TENDER.

See Counterfeit Notes, 1, 2.

TEXAS CATTLE.

The Texas cattle act unconstitutional. The Texas Cattle Act (1 Wag. Stat., p. 251, Sec. 1) is in conflict with that provision of the constitution of the United States, which confers upon Congress the power to regulate inter-State commerce. (Const. United States, Art. 1, Sec. 8.) *Gilmore v. Hannibal & St. Joseph R. R. Co*, 323.

TORT-FEASOR.

See Trespass, 1.

TOWNSHIP BONDS.

1. Township railroad bonds: township aid act of 1868 unconstitutional. The act to facilitate the construction of railroads (Acts 1868, p. 92; Wag. Stat., p. 313, §§ 51, 55), and for that purpose authorizing any municipal township "to subscribe to the capital stock of any railroad company . * * * whenever two-thirds of the qualified voters of such township, voting at an election held for that purpose, are in favor of such subscription," is in conflict with section 14, article 11 of the constitution of 1865, which declares that "the General Assembly shall not authorize any county, city or town to become a stockholder in * * any * * corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election, to be held therein, shall assent thereto," and the act is void. *The State ex rel. Woodson v. Brassfield*, 331.

2. Registration and qualification of voters under the constitution of 1865: evidence. While the provisions of the constitution of 1865 in reference to the registration of voters, and the statutes enacted in pursuance thereof, were in force, those persons only were qualified voters, whose names were placed on the registration books. This was the final, qualifying act, and no matter if a citizen possessed every other qualification, if not registered, he was not a qualified voter. The registration books furnished the test of the number of qualified voters in a township. *Ib.*

3. The "assent" of the qualified voters required by Sec. 14, Art. 11 of the constitution of 1865, before a municipal subscription

could be made to the stock of a corporation, was an affirmative, positive act. Mere inaction of the voters, by failing to vote, did not express assent within the meaning of that section. *Ib.*

4. MUNICIPAL SUBSCRIPTION TO RAILROADS: SURRENDER OF STOCK TO THE COMPANY. Under an act which authorizes a municipal township to subscribe stock in a railroad company, it is not competent for the township to agree to surrender to the company stock of the company for which it subscribes and issues its bonds; and a contract of subscription which contains such an agreement, is void. *Ib.*

PER HOUGH, J.

5. THE LEGISLATURE HAD POWER under the constitution of 1865 to authorize municipal townships to subscribe to the stock of railroad companies, but subject to the restrictions contained in § 14, Art. 11, which prohibited the making of such subscriptions without the assent of two-thirds of the qualified voters. *Ib.*

6. TOWNSHIP AID ACT OF 1868 CONSTITUTIONAL: ELIMINATION OF UNCONSTITUTIONAL WORDS. The act of 1868, to facilitate the construction of railroads, is not unconstitutional. The clause which permits a subscription to be made by a township when the question of subscribing has been submitted to the qualified voters of the township at an election duly ordered, and two-thirds of the qualified voters voting at such election are in favor of the subscription, is in contravention of § 14, Art. 11 of the constitution of 1865, but the words "voting at such election" may be eliminated, and the act will then remain complete and perfect, in harmony with the constitution, and capable of being fully executed. *Ib.*

7. REGISTRATION BOOKS: ELECTION RETURNS: EVIDENCE. Neither the registration books nor the votes actually cast at an election, were conclusive evidence of the number of votes in a township. It was competent to show by testimony *aliunde* that the actual number of voters was greater than the vote cast and less than that registered. *Ib.*

8. TOWNSHIP RAILROAD AID ACT: TWO-THIRDS OF THE VOTERS. The act of 1868, to facilitate the construction of railroads (Acts 1868, p. 92,) is unconstitutional and void, because it permits a subscription to be made by a township to the stock of a railroad company, if two-thirds of the qualified voters who vote on the question at an election are in favor of it, whereas the constitution of 1865 required the assent of two-thirds of all the qualified voters to authorize any municipal subscription. *Webb v. Lafayette County*, 353.

9. ———: DIVERSION OF STATE AND COUNTY REVENUE: LAW UNCONSTITUTIONAL IN PART. This act is also unconstitutional, because section 5 of the act devotes all the State and county taxes to be collected within any township from any railroad company to which the township has subscribed, to the reimbursement of the township for its subscription, and after it is fully reimbursed, then to the school fund of the township. This is indirectly making the State extend its aid to railroads in violation of Sec. 13, Art. 11 of the constitution of 1865; and is likewise making the county extend its aid to railroads without the assent of two-thirds of the qualified voters of the

whole county, in violation of Sec. 14, Art. 11. Section 5 is the compensatory section, and may be said to sustain to the whole act the same relation that the consideration clause sustains to a contract; hence it cannot be held that this section only is inoperative. The whole act is void. *Ib.*

10. ——: UNINCORPORATED TOWNSHIPS. This act is also void because the Legislature had no power to authorize municipal townships to subscribe to railroad companies. It could give the power only to corporate or *quasi* corporate bodies such as counties, cities or towns. *Ib.*

11. MUNICIPAL BONDS issued under an unconstitutional statute, are void into whosoever hands they may come. *Ib.*

PER NAPTON, J.

12. THE TOWNSHIP AID ACT has received a legislative, judicial and popular construction which leaves its validity no longer an open question. *Ib.*

13. HOUGH, J., also dissented from the opinion of the court as to the validity of the act. *Ib.*

14. THE TOWNSHIP RAILROAD AID ACT of March 23d, 1868, is unconstitutional, and bonds issued under it are illegal and void. *Ranney v. Bader*, 476.

TRESPASS.

LIABILITY OF RAILROAD COMPANY FOR TORTIOUS ENTRY OF ITS CONTRACTOR ON LANDS OF ANOTHER. A railroad company, by whose direction a contractor for the construction of its road enters and builds the road upon land which it has acquired, subject to an existing lease, is liable, as a joint tort-feasor with the contractor and his servants, for damages done by them, in the prosecution of the work, to the crops of the lessee. *Ullman v. Hannibal & St. Joseph R. R. Co.*, 118.

TRUSTS AND TRUSTEES.

1. TRUSTEE: CESTUI QUE TRUST: TRUSTEES' SURETIES. Although a trustee has no right to settle a debt due to him as trustee by merely canceling one due from himself in his individual capacity to the debtor, yet if the *cestui que trust* adopts the settlement and compels the sureties of the trustee to make good the amount to him, they cannot afterward recover it of the original debtor. *Sweet v. Jeffries*, 420.

2. CASE ADJUDGED. A sheriff sold land under a decree for partition and received a note for the purchase money. Becoming indebted to the purchaser, he agreed that his debt should be set off against the note, and accordingly executed a deed for the land without col-

lecting the note. The parties entitled to the proceeds of the partition sale sued him and his sureties, alleging that the note had been paid. There was a recovery in this action and the sureties paid the judgment. In an action by them against the maker of the note; *Held*, that the settlement made by the sheriff, though originally unauthorized, had been adopted by the parties in interest and had thereby become binding upon the sureties. *Ib.*

See Attorney and Client, 1.

UNDUE INFLUENCE.

1. Setting aside a deed for undue influence In a suit to set aside a deed as having been obtained by undue influence practiced upon the plaintiff by her step-father, the defendant, it was admitted by the pleadings that when plaintiff was nine years of age her mother, being a widow, intermarried with defendant, and from that time plaintiff lived with defendant as a member of his family, that she was taught by her mother to look upon defendant as her father; that he became her guardian and acquired her complete confidence; that in proceedings for the partition of the estate of her deceased father, a life estate in certain land was assigned to her mother for dower, while other lands were set apart in fee to the children, including plaintiff; that by the repeated representations and importunities of defendant, she was induced to believe that a wrong had been done in making the partition, and to promise that when she came of age she would convey to defendant her interest in the dower land; that when she had attained the age of twenty-two years, and while she was still a member of his household, under his influence, and impressed with the belief that it would be but an act of justice to convey her interest to him, she carried out her promise, and made the conveyance; *Held*, that these facts constituted at least a *prima facie* case of legal fraud, and imposed upon defendant the burden of showing that absolute fairness, adequacy and equity characterized the transaction. *Bradshaw v. Yates*, 221.

2. Setting aside a deed for undue influence: measure of relief: tenant in common. In the present case the plaintiff had a clear right to have a deed which she had made to an undivided half of a tract of land set aside as having been obtained by the exercise of undue influence, but she had permitted almost ten years to elapse before bringing her suit. In the meantime the defendant, who besides being the grantee in this deed, was the owner of the other half interest in the land, had, with the knowledge of plaintiff, and without objection from her, made permanent and valuable improvements on the land; *Held*, that, under these circumstances, the deed ought not to be set aside without terms, but the value of the land, as it was before the improvements were made, should be ascertained, and if defendant would pay plaintiff that sum, with interest, within a time to be fixed by the trial court, the deed should stand, otherwise it should be set aside. *Ib.*

UNITED STATES TREASURY NOTES.

See Counterfeit Notes, 1.

VARIANCE.

See Evidence, 3.

Execution, 1.

VENDOR AND VENDEE.

1 Vendor and vendee of real estate: liability to remove incumbrances: contract executory and executed. Although by the rule well settled both in this country and in England, while a contract for the sale of real estate is still executory, by operation of law and without any agreement of the parties the purchaser has a right to demand a title clear of defects and incumbrances; yet if, instead of taking a deed direct from his vendor, he accepts one from a party who has contracted to convey to his vendor, he thereby waives his right to recourse against the latter for money which he is compelled to pay in removing incumbrances from the land. *Herryford v. Turner*, 296.

2. Case adjudged. After a sale under a deed of trust, but before the execution of the deed by the trustee, the defendant, who was the purchaser at the sale, agreed to sell the land to the plaintiff. At the request of the defendant, and with plaintiff's consent, the trustee executed the deed directly to the plaintiff. At the time of the sale and the execution of the deed, the land was encumbered for taxes, and defendant had knowledge of the fact. Plaintiff was compelled to pay off this encumbrance and brought suit to recover the amount paid; *Held* that, having paid for the land and having accepted a deed therefor from the trustee, the plaintiff thereby waived a deed from the defendant with such covenants of warranty as he had a right to demand, and there being no express undertaking on the part of defendant to pay the taxes, he could not recover. *Ib.*

See Adverse Possession.

Equity, 4.

VENDOR'S LIEN.

Independent security: meaning of the word "due." A contract for the sale of land fixed certain sums to be paid by the purchaser at specified dates, and, in addition, provided that he should pay one of the vendors the amount for which he (the vendor) might be liable as surety on a certain guardian's bond, as soon as the same should be ascertained and known, by note and security. It further expressly reserved liens on the land for "all said sums of money due" from the purchaser to the vendors. In a suit by the vendor, who was liable on the bond, to enforce a lien for the amount of his liability, which had, in the meantime, been ascertained, *Held*, 1st, that the word *due* was used in the sense of *owing*, and referred to this unascertained liability as well as to the fixed sums contracted to be paid, and the vendor's lien was reserved for all alike; 2nd, that being expressly reserved, the lien could be enforced notwithstanding

the contract called for other security in addition. The rule that when the vendor requires independent or collateral security for the purchase money, he will be deemed to have waived his equitable lien, does not apply to such case. *Carr v. Thompson*, 472.

VERDICT.

A VERDICT against the defendant on an indictment consisting of several counts, all of which charge the crime of murder in the first degree, is good without specifying the count on which the jury find him guilty. *The State v. Miller*, 604.

SEE PRACTICE, CRIMINAL, 2.

WAIVER.

SEE INFANCY, 3.

INSTRUCTION, 3.

SALE, 1.

WARRANTY.

WARRANTY OF QUALITY; SALE BY SAMPLE. In order to constitute a warranty of the quality of goods, it is not necessary that the word "warrant" shall be used. It is sufficient if the words used signify an undertaking, on the part of the seller, that the goods sold are what they are represented to be. So, if the seller exhibits samples as a fair specimen, and agrees to deliver goods equal in quality to the samples, and the purchaser buys, relying on this promise, there is a warranty. *Graff v. Foster*, 512.

WILL.

1. WILLS: EVIDENCE. When a question of testamentary capacity is submitted to a jury, it is proper to put them in possession of all the facts relating to the condition of all the property of the deceased, and for this purpose evidence is admissible to show what amount of taxes are imposed and paid upon it. *Young v. Ridenbaugh*, 574.

2. TESTAMENTARY CAPACITY. In order to make a valid will, a testator must have sufficient understanding to know what disposition he wishes to make of his property and to determine whether the will makes that disposition; but he is not required to know fully the legal effect of all its provisions upon the interests and estates devised. *Ib.*

3. ———. The unsoundness of mind sufficient to invalidate a will need not be such as to render the testator incapable of understanding that he is engaged in making a disposition of his property; it is

enough if he is incapable of comprehending the nature and extent of his property, and of knowing what persons are intended to be provided for by the will. *Ib.*

4. NATURE OF PROCEEDING TO SET ASIDE A WILL: WEIGHT OF EVIDENCE: PRACTICE IN SUPREME COURT. A proceeding under the statute to set aside a will is a proceeding at law. An appellate court will not reverse a judgment in such a proceeding on the ground that the jury found against the weight of evidence. *Ib.*

5. DEVISEE NOT LIABLE ON BOND OF DEVISOR. A devisee is not liable on the bond of his devisor, as an heir is on that of his ancestor. This was the rule at common law, and it has not been altered by Wagner's Statutes, section 7, page 1352, or by any other statute of this State. *Sauer v. Griffin*, 654.

6. LIABILITY OF HEIR. An heir is not liable on the bond of his ancestor beyond the value of the estate descended. *Ib.*

SEE PRETERMITTED HEIRS, 3.

PUBLIC ADMINISTRATOR.

WITNESS.

1. CONSTITUTIONAL GUARANTY TO ACCUSED PERSONS OF COMPULSORY PROCESS FOR WITNESSES. Section 3, page 511, Wag. Stat., which provides that a person who shall bring into this State property stolen in another shall be punished in the same manner as if the theft had been committed here, is not in conflict with that provision of the constitution which guarantees to the accused compulsory process for his witnesses. That provision has reference only to such process as the State can execute within her own borders. The fact that the witnesses may be beyond the reach of her process can be no obstacle in the way of conviction. *The State v. Butler* 59.

2. COMPETENCY OF NON-EXPERT TESTIMONY AS TO SANITY. A person who has had an adequate opportunity of observing and judging the mental condition of another, although not an expert, is a competent witness to prove his sanity. The weight to be given to his testimony must depend upon a consideration of all the circumstances under which his opinion was formed. *Moore v. Moore*, 192.

3. CRIMINAL LAW: DEFENDANT AS A WITNESS: IMPEACHMENT. If a defendant in a criminal case becomes a witness in his own behalf, as permitted by the act of April 18th, 1877, (Acts of 1877, p. 356,) he thereby subjects himself to the same rules as to cross-examination and impeachment as other witnesses. *The State v. Clinton*, 380; *The State v. Cox*, 392.

4. PRACTICE, CRIMINAL; CONTINUANCE: CONTRADICTION OF ABSENT WITNESS. The act of February 17th, 1875, (Acts 1875, p. 104,) applies to criminal cases, and permits the State to show that an absent witness has made a statement conflicting with one which has been read to the jury by the defense, under an agreement with the prosecuting attorney, made, as permitted by the act, to avoide a continuance,

that it should be received and read as the testimony which the witness, if present, would give. *The State v. Miller*, 604.

5. WIFE, COMPETENCY AS A WITNESS: AGENCY. In order to make the testimony of a married woman admissible in a suit to which her husband is a party, on the ground that she acted as his agent in the transaction to which it relates, the fact of her agency must be shown by some competent witness, and she is not a competent witness for that purpose. *Chesley v. Chesley*, 54 Mo. 347, disapproved. *Williams v. Williams*, 661.

6. HUSBAND AND WIFE: WIDOW AS WITNESS. A widow is not a competent witness to prove an agreement made by her deceased husband. *Willis v. Gammill*, 730.

SEE NEW TRIAL. 1.

WRIT OF ERROR.

SEE PRACTICE, CRIMINAL, 3.